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**REPORTS OF CASES**

**DECIDED IN THE**

**S U P R E M E C O U R T**

**OF THE**

**TERRITORY OF DAKOTA,**

**WITH**

**NOTES, REFERENCES AND INDEX**

**BY ROBERT B. TRIPP, REPORTER.**

---

**VOLUME 6.**

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**CHICAGO:**  
**E. B. MYERS AND COMPANY,**  
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**1891.**

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*Rec. Sep. 2. 1891*



## OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

---

HON. BARTLETT TRIPP, Chief Justice.

HON. CORNELIUS S. PALMER, Associate Justice.

HON. WILLIAM H. FRANCIS, Associate Justice.

HON. WILLIAM B. McCONNELL, Associate Justice.

HON. CHARLES M. THOMAS, Associate Justice.

HON. JAMES SPENCER, Associate Justice.

HON. JOHN E. CARLAND, Associate Justice.<sup>1</sup>

HON. RODERICK ROSE, Associate Justice.<sup>2</sup>

HON. CHARLES F. TEMPLETON, Associate Justice.<sup>3</sup>

HON. LOUIS W. CROFOOT, Associate Justice.<sup>3</sup>

HON. FRANK R. AIKENS, Associate Justice.<sup>4</sup>

---

DANIEL W. MARATTA, United States Marshal.

JAMES H. C. YOUNG, Clerk.

ROBERT B. TRIPP, Reporter.

---

<sup>1</sup> Appointed March 7, 1888, to succeed Mr. Justice Palmer, whose term of office had expired.

<sup>2</sup> Appointed July 19, 1888, to succeed Mr. Justice Francis, whose term of office had expired.

<sup>3</sup> Appointed under the act of Congress of August 9, 1888, increasing the number of justices.

<sup>4</sup> Appointed to succeed Mr. Justice Carland, resigned.



## PREFACE.

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This volume contains the reports of all the remaining cases of the territorial court in which opinions were written subsequent to those found in volume five. Also the reports of all cases in which memorandum decisions were made, except cases where the question was the sufficiency of the evidence to support the verdict or findings, a few of these, from the condition of the record, it was deemed advisable not to report.

R. B. TRIPP.



## TABLE OF CASES REPORTED IN THIS VOLUME.

	Page.		Page.
Adams v. Smith.....	94	Dakota F. & M. Ins. Co., Water-	
Alderson, School District v.....	145	bury v.....	468
Aller v. Jenks... ..	482	Dartmouth S. Bk. v. School Dis-	
American M. & I. Co., Luce v... ..	122	trict.....	332
Anderson, Territory v.....	300	Davis, Hodgdon v ... ..	21
Armstrong, Territory v.....	226	Dean v. First Nat. Bk.....	222
Beach v. Beach.....	371	Dean, Henry v.....	78
Beach, Beach v.....	371	Dickson, First Nat. Bk. v .....	301
Beaupre, Perry v.....	49	Dodge v. Furber.....	217
Beck, Sturr v.....	71	Edmison v. Hancock .....	231
Board, Territory v.....	39	Ely, Territory v... ..	128
Bode v. New E. I. Co.....	499	Evans v. Hughes County.....	102
Booth, Purcell v.....	17	Farmers & M. N. Bk. v. School	
Bouton v. Haggart.....	32	District.....	255
Brown v. Forbes.....	278	Feldenheimer v. Tressel.....	265
Bulen, Judson v.....	70	Ferris v. Vannier.....	186
Burke, Rushton v.....	478	Field v. Jenks.....	432
Burris, Murry v.....	170	First Nat. Bk., Dean v.....	222
Buttz v. Colton.....	306	First Nat. Bk. v. Dickson.....	301
Capital Bank v. School District..	248	First Nat. Bk. v. Honeyman....	275
Carpenter, United States v.....	294	First Nat. Bk., McLaughlin v....	406
Chicago, M. & St. P. Ry. Co.,		First Nat. Bk. v. North.....	186
Huber v.....	392	First Nat. Bk., Sioux Falls Nat.	
Chicago, M. & St. P. Ry., Pielke v.	444	Bk. v.....	118
Chicago & N. W. Ry. Co., Karr v.	14	Fisk v. Stone.....	35
Citizens' N. Bk. v. Jenks.....	432	Forbes, Brown v.....	273
City of Grand Forks, McLauren v.	397	Fremont, E. & M. V. R. R. Co.,	
City of Rapid, McGuire v.....	346	Sprague v.....	86
Coe, Rathbone v.....	91	Fridley, Van Dusen v.....	322
Coleman, St. Paul F. & M. Ins Co. v.	458	Furber, Dodge v.....	217
Collins, Territory v....	234	Gilbert, Obern v.....	119
Colton, Buttz v.....	306	Gilman, Plymouth v... ..	304
Continental Ins. Co., Smith v....	433	Godfrey, Territory v... ..	46
County of Nelson v. Northcote ...	378	Gossage v. Pennington County..	105
Cox, Territory v.....	501	Grand F. N. Bk. v. Minneapolis &	
Crozier, Territory v.....	8	N. E. Co.....	357
Cummings v. Jenks.....	432		

	Page.		Page.
Gull R. L. Co. v. Keefe.....	160	National G. A. Bk. v. Rayman....	402
Haggart, Bouton v.....	82	Neidecken, St. Paul F. & M. Ins. Co. v.....	494
Hancock, Edmison v.....	231	New E. I. Co., Bode v..	499
Henry v. Dean .....	78	North, First Nat. Bk. v.....	136
Hodgdon v. Davis .....	21	North, Rudolph v.....	79
Honeyman, First Nat. Bk. v....	275	Northcote, Nelson County v.....	378
Hornthal v. Jenks.....	432	Northern P. R. R. Co. v. Jackman	236
Huber v. Chicago, M. & St. P. Ry. Co.....	392	Obern v. Gilbert .....	119
Hughes County, Evans v.....	102	O'Niel v. Murry.....	107
Insurance Co., Lyon v.....	67	Oswald v. McCauley.....	289
Jackman, Northern P. R. R. Co. v.	236	Patterson, Warder v.....	83
Jenks, Aller v.....	432	Peck v. Levinger.....	54
Jenks, Citizens' N. Bk. v.....	432	Pennington County, Gossage v...	105
Jenks, Cummings v.....	432	Perry v. Beaupre.....	49
Jenks, Field v.....	432	Pielke v. Chicago, M. & St. P. Ry. Co.....	444
Jenks, Hornthal v.....	432	Plummer, McMahon v.....	42
Jenks, Straw v.....	414	Plymouth Co. Bk. v. Gilman.....	304
Jones, Territory v.....	85	Pratt, Territory v.....	483
Judson v. Bulen.....	70	Propper, Lander v.....	64
Kalscheuer v. Upton.....	449	Purcell v. Booth.....	17
Karr v. Chicago & N. W. Ry. Co.	14	Rathbone v. Coe.....	91
Keefe, Gull R. L. Co. v.....	160	Raumin, Kronebusch v.....	243
Keehl v. Schaller.....	499	Rayman, National G. A. Bk. v....	402
King, Territory v.....	131	Raymond v. Spicer.....	45
Kronebush v. Baumin.....	243	Reichert v. Simons.....	239
Lander v. Propper.....	64	Rodgers v. McCoy.....	238
Leistekow, Schmidt v.....	386	Rudolph v. North... ..	79
Levinger, Peck v... ..	54	Rushton v. Burke.....	478
Luce v. American M. & I. Co.....	122	St. Croix L. Co. v. Mitchell... ..	215
Lyon v. Insurance Co.....	67	St. Paul F. & Ins. Co. v. Coleman	458
McCauley, Oswald v.....	289	St. Paul F. & Ins. Co. v. Neidecken	494
McCoy, Rodgers v.....	238	Sames v. Spawn.....	16
McGuire v. City of Rapid.....	346	Sandager v. Walsh County.....	81
McHenry, Yerkes v.....	5	Schaetzel, Thompson v.....	284
McKay v. Shotwell.....	124	Schaller, Keehl v.....	499
McLaughlin v. First N. Bk.....	406	Schmidt v. Leistekow.....	386
McLauren v. City of Grand Forks	397	School District v. Alderson.....	145
McMahon v. Plummer....	42	School District, Capital Bank v...	248
McPherson, Territory v.....	27	School District, Dartmouth S. Bk. v. ....	332
Minneapolis & N. E. Co., Grant F. N. Bk. v.....	357	School District, Farmers & M. N. Bk. v.....	255
Mitchell, St. Croix L. Co. v.....	215	Schuster v. Thompson .....	10
Murry v. Burris.....	170	Shotwell, McKay v.....	124
Murry, O'Niel v.....	107	Simons, Reichert v.....	239



# TABLE OF CASES REPORTED.

ix

	Page.		Page.
Sioux Falls Nat. Bk. v. First Nat.		Territory v. Godfrey.....	46
Bk.....	118	Territory v. Jones.....	85
Smith, Adams v.....	94	Territory v. King.....	131
Smith v. Continental Ins. Co.....	433	Territory v. McPherson.....	27
Spawn, Sames v.....	16	Territory v. Pratt.....	483
Spicer, Raymond v.....	45	Thompson v. Schaetzel.....	284
Sprague v. Fremont, E. & M. V. R.		Thompson, Schuster v.....	10
R. Co.....	86	Tressel, Feldenheimer v.....	265
Stone, Fisk v.....	85		
Straw v. Jenks.....	414	United States v. Carpenter.....	294
Sturr v. Beck.....	71	Upton, Kalscheuer v.....	449
Stutsman County, Wallace v.....	1		
Swan, Wallace v.....	220	Van Dusen v. Fridley.....	322
		Vannier, Ferris v.....	186
Territory v. Armstrong.....	226		
Territory v. Anderson.....	300	Wallace v. Stutsman County. ...	1
Territory v. Board.....	89	Wallace v. Swan.....	220
Territory v. Collins.....	234	Walsh County, Sandager v.....	31
Territory v. Cox.....	501	Warder v. Patterson.....	83
Territory v. Crozier.....	8	Waterbury v. Dakota F. & M. Ins.	
Territory v. Ely.....	128	Co. ....	468
		Yerkes v. McHenry.....	5



CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF DAKOTA TERRITORY.

---

**WALLACE ET AL., Respondents, v. STUTSMAN COUNTY, Appellant.**

**1. Taxes, Action to Recover Back — When Maintainable.**

Under § 78, chap. 28, Pol. C., providing that "when, by mistake or wrongful act of the treasurer, land has been sold on which no tax was due at the time, the county is to save the purchaser harmless by paying him the amount of principal and interest to which he would have been entitled had the land been rightfully sold." *Held*, that where the treasurer sold land not subject to taxation (property of the United States) the county was liable to the purchaser for the amount paid and the statutory interest, thirty per cent per annum. **TRIPP, C. J.**, dissenting.

**2. Appeal — Practice — Rehearing, Jurisdiction to Grant.**

Where the *remittitur* has been sent to and filed in the court from which the appeal was taken, without fraud or mistake, the supreme court has no jurisdiction to grant a rehearing.

(Argued and determined at the May Term, 1887.)

**A** PPEAL from the district court, Stutsman county; Hon. **W. H. FRANCIS**, Judge.

This was an action by Chas. S. Wallace and Jas. M. Martin, as assignees of Daniel H. Wallace, plaintiffs, against Stutsman county, to recover back money paid on account of certain tax sales. After the issues had been made up the case was submitted to the court on an agreed state of facts, upon which it rendered judgment in favor of the plaintiffs. It appeared from these facts that the lands sold had, while a part of the public domain, been

granted to the Northern Pacific Railroad Company on certain conditions, which, prior to March, 1886, had not been complied with; that the sales were made to Chas. S. Wallace, one of the plaintiffs, for taxes for the years 1880 and 1882, and that there was a payment by him of taxes on the land for the year 1881 to protect his purchase for 1880; that in August and September, 1886, the district court of that county, at the suit of the Northern Pacific Railroad Company against the county treasurer and said Chas. S. Wallace, had entered decrees perpetually enjoining the treasurer from issuing tax deeds to any one on account of said sales, from which decrees no appeals had ever been taken; that in 1886, said Chas. S. Wallace assigned his tax certificates to the plaintiff, Jas. M. Martin, as assignee of Daniel H. Wallace, to pay certain debts, the surplus, if any, to be returned to said Chas. S. Wallace; that in September, 1886, the plaintiffs tendered to the board of county commissioners of said Stutsman county the tax certificates issued by its treasurer, and offered to surrender them on the payment of the amounts paid and thirty per cent interest per annum, from the dates of the payments; that the defendant refused to pay the same or any part thereof; that none of the lands had ever been redeemed from said sales, or from the taxes subsequently paid.

It was conceded in this court, by the county, that the lands sold for taxes were not subject to taxation during the period involved in this case.

The court as conclusions of law found that no taxes were due on the lands that had been sold; that the lands had been sold by the mistake and wrongful act of the treasurer, and that the plaintiffs were entitled to recover from the defendant the amounts that had been paid, with thirty per cent interest per annum from the date of the payments, and entered judgment against the county, April 13, 1887, for \$35,825.13, whereupon the defendant appealed.

Section 78, chapter 28, so far as applicable, will be found stated in the head-note. Persons entitled to redeem from tax sales were required to pay the bid and thirty per cent interest thereon per annum from the date of the sale and, also, any other taxes the purchaser had paid on the property, with like interest.

*Roderick Rose*, for appellant.

In the absence of statutory provisions the rule of *caveat emptor* applies to purchasers at tax sales. Cooley (2d ed.), 476; 2 Desty, 580; City v. Humphry, 84 Ind. 467; Hamilton v. Valient, 30 Md. 139; Lynde v. Melrose, 10 Allen, 49; Sullivan v. Davis, 29 Kan. 28; Lyon v. Goddard, 22 id. 389; Jenks v. Wright, 61 Pa. St. 410; Rice v. Auditor, 30 Mich. 12; Packard v. New Limerick, 34 Me. 266; Loomis v. Los Angeles, 59 Cal. 456; McWhinney v. Indianapolis, 98 Ind. 182; Hyde v. Supervisors, 43 Wis. 129; Hilgenberg v. Board, 8 N. E. Rep. 294; Cogburn v. Hunt, 56 Miss. 718; Goodman v. Sanger, 91 Pa. St. 71; Worley v. Town, 11 N. E. Rep. 227; Blackwell (3d ed.), 49; Sonoma County Tax Case, 13 Fed. Rep. 789.

In any event respondents could not recover back more than the bid and interest from the demand. Burrows, Taxation, 442; Vermont C. R. R. Co. v. Burlington, 28 Vt. 193; Slack v. Norwich, 32 id. 318; Matheson v. Mazomania, 20 Wis. 191; Noyes v. Haverill, 11 Cush. 338; Look v. Industry, 51 Me. 375; Boston Glass Co. v. Boston, 4 Metc. 181.

By section 78, chapter 28, the legislature never intended to provide a remedy to recover back taxes on lands which it forbid to be taxed. Dwarris, Statutes, 143. Again, this was not a mistake of the treasurer, but the assessor. It was the treasurer's duty to collect the tax. §§ 40, 41, 45, 95, 96, 62, 84, 89, 67, 37, 26, 57, chap. 28, Pol. C.

*Dodge & Camp* and *J. S. Watson*, for respondents.

By section 78, chapter 28, the county is to hold the purchaser harmless if the lands are sold by mistake or wrongful act. We contend: 1. The act of selling was a mistake of fact in the treasurer's supposing the grantee had performed all the conditions, when it had not. 2. The act of selling was a wrongful act within the meaning of this section. 3. Respondents had a remedy at common law, the entire consideration having failed. On the first two points, see §§ 888, 889, 2097, C. C.; Sedg. Const. Stat. 220; 3 Blackstone, 2; Kerr, Fraud & M. 396; Story Eq. 110; East I. Co. v. Neave, 5 Ves. 173; Hastie v. Couluvier, 9 Exch. 102; Cham-

plin v. Laytin, 18 Wend. 407, 31 Am. Dec. 382; Shotwell v. Murray, 1 Johns. Ch. 512. If the treasurer's duties were purely ministerial and he sold property over which his principal had no jurisdiction, his act is wrongful. Story, Agency, §§ 305, 307, 308; Barns v. Foley, 5 Burr. 2711; Tracy v. Swartout, 10 Pet. 80; Ripley v. Galeston, 9 Johns. 201. In view of sections 62 and 52 a discretion is conferred. Presumptively the mistake is one of fact. Jenks v. Fritz, 2 W. & S. 201, Kerr, 405; Black v. Ward, 15 Am. Rep. 162; Cooper v. Phibbs, 15 W. R. 1053; Commissioners v. Young, 18 Kan. 440. Here, it matters not the kind of mistake. Northrop v. Graves, 50 Am. Dec. 264. The statute with its acceptance by the act of purchase constitutes a contract, and a plea of *caveat emptor* or mistake of law will not avail. Corbin v. Commissioners, 1 McCrary, 521; State v. County, 15 N. W. Rep. 375; Commissioners v. Young, 18 Kan. 440; Henry v. Town, 15 Vt. 460; Saulters v. Town, 35 id. 351; Breidin v. Commissioners, 87 Pa. St. 441; Roberts v. Adams, 25 N. W. Rep. 726, 30 id. 405; Norton v. Supervisors, 13 Wis. 684. Chapman v. City, 40 N. Y. 372; People v. Chapin, 5 N. E. Rep. 64; Marsh v. Supervisors, 42 Wis. 355; McCann v. Otoe, 9 Neb. 324; Morris v. County, 42 Ia. 416; Cooley, 370.

Under section 78 respondents are entitled to the same interest as they would have been had the lands been rightfully sold.

Under the facts here presented respondents could recover at common law as for money paid for a consideration that had failed. Norton v. Supervisors, *supra*; Chapman v. City, *supra*; Gillett v. Hartford, 31 Conn. 356; Slack v. Norwich, 33 Vt. 818; Preston v. City, 12 Pick. 7; Boston S. G. Co. v. Boston, 4 Metc. 181; Dow v. Boston, 6 Gray, 131; Joyner v. Third School Dist., 3 Cush. 567; Shaw v. Becker, 7 id. 442; Saulters v. Victory, 35 Vt. 357; Commissioners v. Young, 18 Kan. 440; Northrop v. Graves, 19 Conn. 548, 50 Am. Dec. 264; Culbreath v. Culbreath, 7 Ga. 64, 50 Am. Dec. 375; Moses v. Macfarland, 2 Burr. 1005; Black v. Ward, 27 Mich. 191, 15 Am. Rep. 162; Thompson v. Roe, 22 How. 422. Section 73, chapter 28, requires no examination of the title by the purchaser, it guarantees it.

The right of recovery, however, is secured by section 78. If the lands were not liable to taxation, clearly their sale was a mis-



take or a wrongful act. The section has a two-fold purpose — to secure the purchaser and promote public interest.

By the COURT:

The judgment in this case is affirmed. All of the justices concur, except TRIPP, C. J., who dissents.

REPORTER: — At the February Term, 1888, the October Term, 1887, not having been held, the appellant made a motion for a rehearing. It appeared that the *remittitur* had been sent down and filed in the court below, thereupon the court made the following order:

The motion for a rehearing in this case is denied on the ground that this court, after the filing of the *remittitur* in the lower court without allegation of inadvertence, fraud or mistake, has lost jurisdiction. All the justices concurring.

---

YERKES, Appellant, v. McHENRY, Respondent.

#### Judgment — Opening — Jurisdiction.

Where by mistake of fact an attorney consented to the rendition of a judgment against his client for an amount in excess of what the other party was entitled to, and within sixty days after the discovery of the mistake the client applied to have the judgment vacated, and for leave to defend as to the excess, but the term had passed and more than a year from the rendition of the judgment had expired, *held*, the court could grant no relief either at common law, or under § 143, C. C. Pro., which provides that the court “may \* \* \* in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect.”

(Argued and determined at the February Term, 1887.)

APPEAL from the district court, Cass county; Hon. W. B. McCONNELL, Judge.

This was an action by a mortgagee to recover possession of the mortgaged chattels, commenced the 9th day of June, 1883. The case was called for trial on the 11th day of December, 1884, and the defendant withdrew his answer, whereupon the plaintiff at that time took judgment according to the prayer of his complaint, being the ordinary judgment in claim and delivery.

On the 29th day of March, 1886, the defendant applied to the

court to have the judgment opened and for leave to answer. The application was supported by affidavits and a proposed answer. It appeared from the affidavits that several of the animals upon which the mortgage had been given had died without fault of the mortgagor prior to the commencement of the action, and also that some of the property had been stolen. The value of this property, according to the findings of the court in the original judgment of December, 1884, was \$520.

The reason given for not interposing this defense before and for permitting the judgment to be taken, was presented by the following affidavit of the defendant's attorney: "M. W. Greene being first duly sworn says that he is, and was at the time of the entry of judgment in the above-entitled action, one of the attorneys for the defendant therein; that as such attorney he was, on the 11th day of December, 1884, in attendance in this court when said cause was reached for trial; that through inadvertence or mistake, the defendant and the person who had charge of this case in the office of Miller & Greene, said defendant's attorneys, had failed to inform affiant of the fact that any of the property described in the complaint had not been taken by the officer who served the papers in said action, or that any of the property described therein was dead, or had been stolen from the defendant before the commencement of this action; that the attention of this affiant had not, at that time, been called to the fact, nor did he, at that time, know that the property described in the complaint had been rebonded by said defendant; that this affiant consented to withdraw the defendant's answer, and that judgment be entered for the plaintiff, supposing and believing that the property described in said affidavit and notice in claim and delivery, and all thereof was in the possession of the plaintiff, and that a judgment for the plaintiff would simply determine his right to retain the same under the chattel mortgage described in said complaint.

"That affiant further says that he has within the last sixty days heard a full statement of the defendant's case and believes that said defendant has a good defense upon the merits to the extent of the value of the property described in his proposed answer herein."

The court made an order that the defendant's motion to open

the judgment and for leave to answer be granted unless the plaintiff within ten days consented, that the judgment be reduced \$520, the value of the property lost. The plaintiff having declined to make the reduction, the defendant was let in to defend, and the trial resulted in a reduction of that amount, whereupon the plaintiff appealed, assigning error upon the action of the court in setting aside the judgment and allowing the defendant to answer.

During the periods involved there were two terms of court held a year in Cass county. Laws 1881, chap. 84, § 7, subd. 4.

*Stone & Newman*, for appellant.

The court had no power to make the order vacating the judgment, as more than one year had elapsed.

A judgment cannot be set aside after the term, except by statutory authority. *Snydam v. Pitcher*, 4 Cal. 280; *Carpenter v. Hart*, 5 id. 406; *Robb v. Robb*, 6 id. 21; *Bell v. Thompson*, 19 id. 707; *Lattimer v. Ryan*, 20 id. 628; *Show v. McGreggor*, 8 id. 522; *Casement v. Ringgold*, 28 id. 335; *Spafford v. Janesville*, 15 Wis. 474; *State v. Waupaca Bank*, 20 id. 640; *Loomis v. Rice*, 37 id. 262; *Breed v. Ketchum*, 51 id. 96; *Freeman*, § 96; *Roberts v. Haggart* (Dak.), 20 N. W. Rep. 656; § 143, C. C. Pro.; *Jex v. Jacob*, 7 Abb. N. C. 452; *Hunt v. Stevens*, 26 Ia. 399.

*H. F. Miller*, for respondent.

The only question is, was there an abuse of discretion? This was a discretionary order. *Baldwin v. Mayor*, 2 Keyes, 387; *People v. R. R. Co.*, 29 N. Y. 418; *Ramsey v. Gould*, 4 Lans. 476; *Hatch v. Central National Bank*, 78 N. Y. 487; *N. Y. Ice Co. v. N. W. Ins. Co.*, 23 id. 357; *Dinsmore v. Adams*, 5 Hun, 149; 66 N. Y. 619; *White v. Coulton*, 59 id. 629; *Miller v. Tyler*, 58 id. 477.

A party has no substantial right in matters resting in discretion. Such an order will not be reviewed unless there has clearly been an abuse of power. 4 Wait Pr. 328, 329; *Ramsey v. Gould*, *supra*; *Miller v. Tyler*, *supra*; *Mead v. Mead*, 2 E. D. Smith, 223; *Whittaker v. Desposse*, 7 Bost. 678; *Howe v. Independence Co.*, 29 Cal. 72; *Roland v. Kreyenhagen*, 18 id. 455.

By the Court:

The judgment in this case is reversed on the ground that the court erred in holding that the respondent could come into the district court after the expiration of one year, and have the judgment set aside and be permitted to defend — no such right existing at common law, and the right given by statute being limited to one year.

The cause is remanded with instructions to reinstate the former judgment entered herein. All of the justices concur.

---

TERRITORY OF DAKOTA, Defendant in Error, v. CROZIER, Plaintiff  
in Error.

**Criminal Law — Malicious Mischief, What Constitutes.**

Under § 2, chap. 62, Laws 1881, Comp. L., § 6980, providing a penalty for “willfully or maliciously” injuring “any neat cattle \* \* \* the property of another,” there need be no express malice against the owner in order to constitute the offense, it is sufficient as to this if there was an intention to “injure” cattle, the property of another.

(Argued and determined at the May Term, 1887.)

**E**RROR to the district court, Codington county; Hon. L. K. CHURCH, Judge.

The indictment in this case alleged: “That William Crozier, upon the 14th day of October, 1885, at said county, with force and arms, did maliciously, feloniously and unlawfully injure neat cattle then and there the property of James Gordon and Charles Gordon, viz.: one bull, one steer and two heifers, by shooting the said animals with powder and shot by means of a shot-gun, said animals being then and there of the value of \$100, contrary to the statute,” etc.

At the close of the testimony the defendant at the proper time requested the court to instruct the jury as follows: “Before the jury can convict the defendant under the indictment in this case, they must be satisfied by the evidence beyond a reasonable doubt, that at the time of the alleged shooting, there existed express malice in the mind of the defendant against the owners of the property alleged to have been injured.” The court refused this

request and instructed them on this issue as follows: "It is not a question of the intention to injure another person, but it is the intention to injure the property of another; and consequently if these cattle did, in fact, belong to some person at the time, it makes no difference whether the defendant knew at the time the offense occurred who was the owner of the cattle." The court also charged the jury that "the evidence \* \* \* is undisputed that the cattle belonged to this man Gordon."

The defendant was found guilty as charged in the indictment. After the denial of a motion for a new trial and the entry of final judgment he sued out this writ.

The statute under which the indictment was drawn is as follows: "If any person or persons shall willfully and maliciously kill or destroy any neat cattle, horse, mule, ass or sheep of any age or value, the property of another or others, or shall willfully or maliciously injure any such animal or animals, the property of another or others, he or they shall be punished," etc. § 2, chap. 62, L. 1881, Comp. L., § 6930.

*S. B. Van Buskirk*, for plaintiff in error.

Could there be a conviction without showing the act was prompted by a feeling of ill-will, or malice toward the owner? We think not. See 4 Blackstone, 245, 2 East. C. L. 1072; Arch. C. L. (8th ed.) 1547; *State v. Robinson*, 32 Am. Dec. 661, n. p. 666; *State v. Pierce*, 7 Ala. 728; *State v. Wheeler*, 3 Vt. 344, 23 Am. Dec. 212; *Northcot v. State*, 43 Ala. 330; *Hobson v. State*, 44 id. 380; *Dawson v. State*, 52 Ind. 478; *State v. Lend*, 6 N. W. Rep. 168; *State v. Enslow*, 10 Ia. 115; *Wright v. State*, 30 Ga. 325; *Duncan v. State*, 49 Miss. 331; *State v. Newby*, 64 N. C. 23; *State v. Jackson*, 12 Ired. 329; *State v. Latham*, 13 id. 33; *State v. Hill*, 79 N. C. 656; *State v. Wilcox*, 24 Am. Dec. 569; *Goforth v. State*, 8 Humph. 37; *U. S. v. Gideon*, 1 Minn. 292; *Kilpatrick v. People*, 5 Den. 277; *State v. Allen*, 72 N. C. 114.

Section 2, chapter 62, Laws of 1881, by the use of "willfully or maliciously," instead of "maliciously, willfully," as in chapter 56, Penal Code, did not enlarge the rule as to the offense, for these words are used indiscriminately in characterizing the acts

that constitute crimes. *Dexter v. Spear*, 4 Mason, 115; *Com. v. Kneeland*, 20 Pick. 220; *State v. Clark*, 29 N. J. L. 96; *Halstead v. State*, 41 id. 552; *Cutler v. State*, 36 id. 125; *State v. Preston*, 34 Wis. 675.

*Chas. F. Templeton*, Attorney-General, and *F. E. Van Liew*, District Attorney, for defendant in error.

This indictment is under section 2, chapter 62, Laws 1881, C. L., § 6930. Willful injury alone without malice of any kind would have been sufficient. Willful does not imply malice or even an intention to injure another. § 769, Penal Code.

Plaintiff's instruction was properly refused. *Johnson v. State*, 37 Ala. 457, 4 Cr. L. M. 116; *Tatum v. State*, 66 Ala. 465, 8 Am. Dec. 670, n.; *State v. Avery*, 44 N. H. 392; *State v. Hackfoth*, 2 West. Rep. 588; *Brown v. State*, 26 Ohio, 176; *Mosley v. State*, 28 Ga. 190; *Bish. C. L.*, § 436; *Whart. C. L.* (8th ed.), § 1082; *State v. Williamson*, 27 N. W. Rep. 259; *Snap v. People*, 19 Ill. 80.

Had the indictment been under section 694, Penal Code, it would not have been necessary to prove express malice against the owner. §§ 768, 772, Penal Code, and the authorities above cited. The purpose of these statutes was to prevent wanton injury to animals without regard to malice toward any one.

By the COURT :

The judgment in this case is affirmed. All the justices concurring, except THOMAS, J., not sitting.

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SCHUSTER ET AL., Appellants, v. THOMPSON ET AL., Respondents.

**Set-Off and Counter-Claim — Liability on Attachment Bond, not Subject of.**

By section 119, C. C. Pro., a counter-claim " must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: 1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. 2. In an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action." *Held*, that in an action on contract, a right of action in favor of the defendants on an attachment bond given by the



plaintiffs with two sureties in a former action on the same contract would not constitute a counter-claim.

(Argued and determined at the May Term, 1887.)

**T**HIS is an appeal from the district court, Minnehaha county;  
Hon. C. S. PALMER, Judge.

This was an action on an account for goods, wares and merchandise sold and delivered by the appellants to the respondents, at Madison, Lake county, D. T. The appellants consisted of a firm, the members of which were A. N. Schuster, August Schuster, J. M. Blackmore and E. H. Bouton, and did business at St. Joseph, Mo., under the name of A. N. Schuster & Co. The respondents also consisted of a firm, the members being Knut Thompson and Ole T. Thompson.

The complaint was in the ordinary form for goods sold and delivered. The defendants admitted the allegations of the complaint, but "by the way of counter-claim" set up a right of action against the plaintiffs on an attachment undertaking given by them in an action brought on this same account before its maturity. The undertaking, omitting the title, was as follows:

"A. N. Schuster & Co., plaintiffs, have commenced an action by summons for the recovery of money from Knut Thompson and Ole T. Thompson, defendants, and have made or are about to make application for an attachment according to the provisions of article 4 of chapter 11 in the Code of Civil Procedure against the property of Knut Thompson and Ole T. Thompson, defendants, as security for the satisfaction of such judgment as the plaintiffs may recover in said action. Now, therefore, if Knut Thompson and Ole T. Thompson, the defendants, recover judgment against the said plaintiffs, or if the attachment to be issued in this action be set aside by order of the court, we, S. W. Jacobs and E. H. Jacobs, undertake, promise and agree to and with the said defendants, that the said plaintiffs shall and will pay all costs that may be awarded to said defendants, and all damages they may sustain by reason of the attachment, not exceeding the sum of \$1,300. Dated the 18th day of December, 1883. A. N. Schuster & Co., by F. L. Soper, their attorney. S. W. JACOBS and E. H. JACOBS."

The answer also alleged the issuance and levy of the writ of attachment upon the property of the defendants and that the attachment was afterward set aside by an order of the court and concluded with a prayer for damages.

The plaintiffs demurred to the counter-claim on the grounds of a defect of parties and the insufficiency of the facts to constitute a counter-claim. The demurrer was overruled and the plaintiffs excepted. At the trial the plaintiffs also objected to the introduction of any evidence under the counter-claim on the same grounds. The objection was overruled and the plaintiffs excepted. On the trial the defendants recovered a verdict for \$1,200 on their counter-claim. A motion for a new trial having been overruled, the defendants had a judgment allowing them this amount on the demand sued for, whereupon the plaintiffs appealed.

*Winsor & Swezey*, for appellants.

The plaintiffs demurred to the counter-claim, and at the trial objected to evidence under it on the following grounds:

1. The said counter-claim does not state facts sufficient to constitute a counter-claim against the plaintiffs.

2. There is a defect of parties in that S. W. Jacobs and E. H. Jacobs are not made parties to the action.

3. The counter-claim does not state facts constituting a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiffs' claim or connected with the subject of the action.

The undertaking was a joint obligation. §§ 802, 950, 951, C. C.; *George v. Tate*, 102 U. S. 564; 1 Add. Cont., §§ 46, 47; *King v. Hoare*, 13 M. & W. 505; *Addison v. Gibson*, 10 Q. B. 106; *Gross v. Williams*, 7 H. & N. 675; 1 Pars. Cont. 11, n. (a); 2 Am. Dec. n. p. 115; *Wood v. Fisk*, 63 N. Y. 245; *Davis v. Van Buren*, 72 id. 587; *Coffin v. McLean*, 80 id. 560; *Duff v. Hobbs*, 19 Cal. 646; *McConihe v. Hollister*, 19 Wis. 269; *Boyd v. Beaudin*, 55 id. 195.

“Wherever an obligation is undertaken by two or more, or a right given to two or more, it is the general presumption of law that it is a joint obligation or right. Words of express joinder are not necessary for this purpose; but, on the other hand, there

should be words of severance, in order to produce a several responsibility or a several right."

Section 501 of the New York Code is the same as section 119 of our C. C. Pro., and the interpretation of the Court of Appeals of that State is almost in the language of the statute, and makes it certain that a counter-claim "must be" one on which "a several judgment might be had in the action."

The inseparable nature and entirety of a joint obligation is illustrated in the cases holding that a judgment against one joint debtor bars an action against the others. Wells, *Res Adju.*, §§ 3, 36, 37; 2 Kent Com. 389; Ward v. Johnson, 13 Mass. 148; Smith v. Black, 9 Serg. & R. 142; Bowen v. Hastings, 47 Wis. 232; U. S. v. Price, 9 How. 90; Pickersgill v. Lahens, 15 Wall. 140; R. R. Co. v. Hayden, 119 Mass. 361.

It is the inseparable nature of a joint obligation that has established the rule that all the obligors must be made parties to the action in which it is sought to be enforced. Although the objection is in the nature of a special demurrer, still the rule is well recognized in this form. §§ 113, 122, C. C. Pro.; Slutts v. Chafee, 48 Wis. 617; Bowen v. Crow, 20 N. W. Rep. 850; Pierce v. Harrington, 1 Gray, 595.

The sufficiency of this undertaking as the foundation of a counter-claim was properly raised on the trial by an objection to the introduction of the instrument itself in evidence. § 140, C. C. Pro.; Cunningham v. Hobart, 7 Gray, 423; 1 Gr. Ev., §§ 64, 66; Walter v. Bennett, 16 N. Y. 250; Burger v. Ins. Co., 17 Barb. 274; Belknap v. Sealey, 14 N. Y. 143; Morgan v. Menzies, 60 Cal. 340.

*Kennedy Brothers*, for respondents.

Is this undertaking joint on the part of the plaintiffs and the sureties?

Under sections 802, 803 and 950 we think not.

The test is, (1) Whether the parties to it are interested in the consideration; (2) Whether they are entitled to contribution from each other. Under these rules the authorities cited by appellants are not in point. We admit the sureties on the undertaking are joint obligors. All the cases cited are to this effect, holding that

the sureties being joint obligors, only the survivors are liable. The question as to whether the action survives against a party to an obligation is a conclusive test as to whether he is a joint or several obligor. The question is, whether or not death would release the principal on this undertaking. The appellants cite no cases where this is held.

“The contract must be measured and moulded according to the interest of the covenantees.” 1 Pars. Cont. 13, 20; *Anderson v. Martindale*, 1 East, 497; *Platt, Covenantees*, 123.

Measuring the undertaking by this rule, the sureties, Jacobs, have no interest in being made parties; the plaintiffs are the ones who agreed to pay the damages, and they cannot object that their sureties are not joined, especially when by the nature of the action and the form of the pleadings no judgment can in any event be obtained by the defendants. If both parties had obtained judgments on their respective claims can there be any question but that the one would have had the right to set off the one judgment against the other? The court properly sustained the counter-claim. *Craig v. Fry*, 9 Pac. Rep. 550.

Further, the covenants of the principal and the sureties are different; the principal agrees to pay the damages caused by the wrongful suing out and levy of the attachment, and the sureties agree to pay the damages in the event that he does not. It is not an absolute promise on their part, but conditional.

The COURT :

The judgment is reversed on the ground that the court erred in permitting the bond in attachment to be set up as a counter-claim to the main claim on which the attachment was issued. All concur, excepting Justice SPENCER, not sitting.

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KARR, Respondent, v. CHICAGO & NORTH-WESTERN RY. Co.,  
Appellant.

**Appeal—Notice—Sufficiency—Jurisdiction.**

By § 89, Justices' Code, as amended, Laws 1881, chap. 4, § 1, p. 5, with reference to the contents of a notice of appeal, it is provided, it “must state whether the appeal is taken from the whole or a part of the judgment; and if from a part, what part, and whether the appeal is taken on

questions of law or fact, or both." Section 91, as amended, Laws 1879, chap. 31, § 2, p. 100, provides that, "when a party appeals to the district court on questions of fact, or on questions of both law and fact, and demands in his notice of appeal a new trial in the district court, no statement (on appeal) need be made, but the action must be tried anew in that court." *Held*, that where the appeal was upon questions of both law and fact, there need be no demand for a new trial in the notice in order to give the district court jurisdiction to determine the questions apparent of record, and passed upon by the justice.

(Argued and determined at the May Term, 1887.)

**A** PPEAL from the district court, Hughes county; Hon. SEWARD SMITH, Judge.

This is an appeal from an order dismissing an appeal from a justice of the peace on the ground of the insufficiency of the notice. The notice was as follows:

"Territory of Dakota, In Justice Court, County of Hughes,  
Before Jas. I. Houtz, J. P.

SAMUEL KARR, *Plaintiff*,  
*vs.*  
CHICAGO & NORTH-WESTERN  
RAILWAY COMPANY, *De-*  
*fendant.*

*Notice of Appeal from Judgment of Justice of the Peace.*

"Please take notice that the defendant and appellant in the above-entitled action, appeals from the judgment entered therein on the 5th day of August, 1884, in favor of the plaintiff and against the defendant for sixty-one dollars and fifteen cents, to the district court in and for Hughes county upon the questions of both law and fact therein. Yours, etc.,

"WILLIAM T. LOVE, *Attorney for Defendant.*

"To L. E. GAFFY and JOHN WHITE, *Attorneys for Plaintiff*,  
and JAMES I. HOUTZ, Esq., *Justice of the Peace of the County of Hughes.*"

The original action in the justices' court against the company was for killing stock, and the complaint not showing that there had been an appraisal of the stock, under sections 680, 681, C. C. Pro., the defendant demurred to it on the ground that it did not state facts sufficient to constitute a cause of action. The

demurrer was overruled by the justice, and a judgment having thereafter been rendered against the defendant, it appealed. In the district court, when the defendant sought to have the action of the justice in overruling the demurrer reviewed, the plaintiff interposed an objection and moved to dismiss the appeal, "for insufficiency in the above notice in not demanding in said notice of appeal a new trial in the district court." This motion was sustained, and the defendant appealed to this court.

*R. H. Brown*, for appellant.

The appeal being upon questions both of law and fact, the court acquired jurisdiction by this notice. §§ 89, 91, Justices' Code. The omission to demand a new trial, if it were necessary in view of section 89, would not authorize the dismissal. § 145, C. C. Pro.

A statute conferring a right of appeal should have a liberal construction. 53 Barb. 407, 411; 63 id. 299, 309; 35 How. Pr. 193.

*N. D. Walling* and *T. J. Walsh*, for respondent.

THE COURT:

Reversed upon the ground that the court erred in dismissing the appeal, and in declining to entertain jurisdiction of the case, and determine the questions of law apparent of record and raised by the appeal. All the justices concurring.

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SAMES, Appellant, v. SPAWN, Respondent.

**Pleading — Complaint — Guaranty — Sufficiency.**

The complaint alleged that on the 21st of January, 1882, the plaintiff and defendant entered into a written contract, whereby the plaintiff appointed defendant his agent to sell his corn cultivators and wagons for the counties of M. and L.; that among other things defendant agreed to indorse, guarantee and by said contract guarantees the payment of all notes turned over to plaintiff in settlement for machines and wagons sold, waiving notice and protest; that on May 1st, 1882, defendant sold and delivered to A. one of said cultivators, and received in payment a promissory note, dated that day, due January 1st, 1883, whereby A. promised to pay to the order of said defendant \$43, with interest at ten per cent per annum until paid; that afterward said defendant assigned and delivered said

note to this plaintiff, and there is due thereon \$48 with interest aforesaid. *Held*, the complaint did not state facts sufficient to constitute a cause of action.

(Argued and determined at the May Term, 1887.)

**A** PPEAL from the district court, Minnehaha county; Hon. C. S. PALMER, Judge.

The above is the first cause of action in the complaint in this case. It contained several others differing only as to the maker of the note, time of payment and amount. To the above cause of action and all of a similar character the defendant demurred, because the same did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and the plaintiff electing to stand on his complaint, the court entered judgment dismissing it as to such causes as had been demurred to, whereupon the plaintiff appealed.

*Bailey & Davis*, for appellant.

There were two agreements, one to indorse and guarantee, the other "he guarantees." The latter is counted upon and is sufficient.

*Winsor & Swezey*, for respondent.

The causes of action demurred to do not sufficiently set forth any liability on the part of the defendant.

By the COURT:

The judgment in this case is affirmed, all of the justices concurring.

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PURCELL, Respondent, v. BOOTH, Appellant.

#### Appeal — Jurisdiction — Justice Peace.

By § 2, sub. 2, Justices' Code, the jurisdiction of justices of the peace extends "to an action \* \* \* where the sum claimed does not exceed one hundred dollars." By § 23, a defendant's answer may contain a "counter-claim upon which an action might be brought by the defendant against the plaintiff in a justice's court." The plaintiff sued for \$80; the answer of the defendant contained an admission of plaintiff's demand, and a counter-claim for \$135, with a prayer for judgment for the difference, \$55. The justice having sustained a demurrer to the counter-claim, entered judgment for the plaintiff, and the defendant appealed without any

statement. The district court dismissed the appeal on the grounds that the justice had no jurisdiction of the counter-claim, and the appeal had been taken on questions of law and fact. *Held*, error. Section 89, as amended, L. 1881, chap. 4, § 1, Comp. L., § 6129, provides that "any party dissatisfied with a judgment rendered in a justice's court may appeal therefrom to the district court," \* \* \* and the notice of appeal must state whether the Appeal "is taken on questions of law or fact, or both." Section 90, as amended, L. 1879, chap. 31, § 1, Comp. L., § 6130, provides that a party appealing on questions of law alone, must have a statement of the case settled by the justice.

(Submitted and determined at the May Term, 1887.)

**A**PPEAL from the district court, Spink county; Hon. L. K. CHURCH, Judge.

The pleadings in the justice's court and the law with reference to appeals therefrom are stated in the head-note. There was no statement on appeal; the record consisted of the pleadings and a copy of the justice's docket entries.

The proceedings had in the district court are shown by the judgment, which is as follows:

The above case coming on to be heard, July 14, 1886, and the plaintiff objecting to the jurisdiction of the court over the counter-claim set up in the answer on the ground that the sum claimed therein exceeds the jurisdiction of the court from which the appeal is taken, and the plaintiff further objecting to the trial of the case for the reason that the appeal is taken on questions of law and fact, and a new trial demanded in the district court, whereas there has been no trial in the justice court, and the judgment therein was rendered purely on questions of law arising on the pleadings, and the court having heard the arguments of counsel for the plaintiff and defendant, and being satisfied that said objections are well taken, it is ordered that the appeal herein be and the same is hereby dismissed and the judgment of the justice in all respects affirmed. By the court, L. K. CHURCH, Judge.

*Hassell & Myers*, for appellants.

The court erred in holding it had no jurisdiction. The defendant in his answer set up two counter-claims for \$45.82 and \$90 respectively, admitted plaintiff's claim, \$82.70, by not denying his complaint, and prayed judgment for only \$53.12 and costs. Un-



der this answer uncontradicted as the matter stood before the justice, he could not have given judgment for more than \$53.12.

Appellant maintains that for a claim to exceed the jurisdiction of a justice "it must appear from the pleadings that it was possible for the justice, consistently with the pleadings, to render judgment against one of the parties in the action for more than \$100." *Madison v. Spitsnoble*, 12 N. W. Rep. 317; *City v. Drake*, id. 594; *Keegan v. Shingleton*, 5 Wis. 115.

The language of the statute is, "where the sum claimed does not exceed one hundred dollars." Justices' Code, § 2, subd. 1; *Barber v. Kenedy*, 18 Minn. 218.

*Heneke v. Wheeler & W. M. Co.*, 7 N. W. Rep. 780, cited by plaintiff, in which the balance of a large, unsettled account was in question, is inapplicable, because it was under a statute which limited the jurisdiction in actions on account to cases where the aggregate of the items of the account shall not exceed \$500, and which shall have been reduced by credits to a sum which does not exceed \$200. R. S. Wis. 1878, chap. 154, § 3572.

Both counter-claims set up in the answer are founded on contract, and each constitutes a claim upon which an action might have been brought by the defendant against the plaintiff in a justice's court. Justices' Code, § 23; *Tuttle v. Morse*, 1 Johns. Cas. 25; *Holgate v. Broome*, 8 Minn. 209; *O'Brien v. Pomeroy*, 22 id. 130; *Nichols v. Rush*, 3 Scam. 298; *Breese*, 153; 24 Ill. 114; 3 Caines Cas. 174; 29 Ill. 178.

The district court had jurisdiction, although the appeal was taken on questions of both law and fact, and a new trial demanded, even though no evidence was taken below, and the judgment rendered on questions of law arising on the pleadings.

The justice code provides for an appeal on questions of both law and fact and for a new trial in the district court if the appellant so elects. §§ 89, 90, 91. Section 96 refutes the assumption that the district court sits as an appellate court in cases where appeals are taken on questions of both law and fact, and a new trial demanded. The language is, "When the action is tried anew, upon appeal, the trial must be conducted in all respects as trials in the district court." See also *Bonesteel v. Gardner*, 1 Dak. 872.

*H. C. and T. J. Walsh*, for respondent.

The appeal was properly dismissed. 1. The justice had no jurisdiction of the subject-matter of defendant's answer and the district court could acquire none by appeal; 2. The appeal was taken on questions of law and fact and a new trial demanded when there had been no trial in the justice court, the judgment having been rendered on questions of law arising on the pleadings.

The purpose of the organic act and code was to preclude justices from having jurisdiction in cases involving the investigation of claims of a greater amount than \$100. R. S. U. S. § 1926; Justices' Code, § 2, subd. 1; § 23.

A general denial of the allegations of the defendant's counter-claim would have resulted in a trial of an issue involving \$135. This is not a case where the party asserting the claim beyond the jurisdiction offers to remit a portion of it. The defendant comes in and insists on satisfaction of his entire claim. He asks, it is true, affirmative relief to the extent only of \$55, but claims \$135 to be due him, and asks that \$80 be set off against the claim of plaintiff and that he have judgment for \$55 more. The claim asserted by plaintiff and that of the defendant are in no way connected. They bear no such relation as do the debit and credit items of an account where it is understood the lesser shall be considered a payment *pro tanto* of the greater. But even though these separate claims could be considered as opposite side of an account, still the court could not acquire jurisdiction, the matter of payment being a defense not proper to be pleaded by the plaintiff. The debit side of the account alone is to be considered in determining whether or not the court has jurisdiction. This rule was announced very early in Wisconsin under a statute and an organic act identical in substance with ours, except that the limit there prescribed was \$50 instead of \$100 as fixed here. *Barker v. Baxter*, 1 Pinney, 407; *Woodward v. Gardner*, 2 id. 28; *Clark v. Cornelius*, Breese, 21, 293; *Wells*, Jur. 101. See also *Holden v. Higgins*, 3 Pa. 469; *Bates v. Downer*, 4 Vt. 178; *Stevens v. Howe*, 6 id. 572.

If the appellant could not maintain an action in the justice's court on the facts set up in his answer, he cannot assert them as a

counter-claim. Justices' Code, § 23; *Malson v. Vaughn*, 23 Cal. 62; *Maxfield v. Johnson*, 30 id. 546.

The powers of the district court in such cases are appellate only, not original, and it has only the powers granted by statute. Its jurisdiction extends only to the correction of errors in the proceedings of the court below. When these errors are of fact, or of both law and fact, and the appellant demands it in his notice of appeal, he may have a new trial. This presupposes 1. That an issue of fact was raised by the pleadings below; 2. That that issue of fact was determined. It is improbable that the legislature intended to provide for an appeal on questions of fact, or of law and fact, in cases involving no questions of fact. At best the appeal in this case must be considered as an appeal on questions of law alone, and no "statement of the case" having been prepared or transmitted with the papers the appeal was properly dismissed.

The words "new trial" mean nothing unless they mean a second or further trial, and the word "trial" as used in section 91 is employed in the ordinary sense. § 285, C. C. Pro. Its use in connection with appeals on questions of fact, or of law and fact only, shows clearly that this is the signification intended. But how can there be a new trial of an issue of fact in the district court where there has been no trial in the justice court?

By the COURT:

Reversed upon the ground that the court erred in dismissing the appeal and not entertaining jurisdiction of the case upon the pleadings and record set up by the justice of the peace. All concur, except Justice THOMAS, not sitting.

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HODGDON ET AL., Appellants, v. DAVIS, Respondent.

**1. Mortgage — Foreclosure, Right of.**

A mortgage given to secure the payment of a promissory note, with "interest payable annually," contained a provision that "in case default should be made in the payment of said sum of money or any part thereof, \* \* \* then \* \* \* the whole, principal and interest, of said note shall, at the option of the holder thereof, immediately become due and payable." *Held*, that on default in the payment of an installment of interest, the

holder, without notice of election, could foreclose by advertisement (a method allowed by statute) for the whole debt under a power to "sell \* \* \* in the manner now or that may hereafter be provided by law."

## 2. Sheriff—Deputy, Acts of.

Under § 603, C. C. Pro., providing that foreclosure sales by advertisement "must be made \* \* \* by the sheriff or his deputy," and § 606, providing "the officer \* \* \* making the sale shall immediately give to the purchaser a certificate of sale." *Held*, that a sale and certificate by a deputy, not in the name of his principal, while "perhaps irregular," was valid.

## 3. Usury.

D. entered into a contract with H. whereby he loaned him a certain sum of money and took his note and mortgage therefor, which was also made to include a first mortgage on the property which D. agreed to pay off, and the entire debt bore interest at the highest rate allowed by law. At the time, D. did not pay off the first mortgage, which drew a much lower rate of interest. *Held*, the contract was not usurious.

(Argued and determined at the February Term, 1888.)

**A** PPEAL from the district court, Minnehaha county; Hon. C. S. PALMER, Judge.

This was an action by Alfred M. and Emily J. Hodgdon, plaintiffs, against L. F. Davis, defendant, to set aside a foreclosure sale, and in the event that relief was denied, for an accounting and a right to redeem. The case was determined below by the sustaining of a demurrer to the complaint. The complaint alleged that on and prior to the 14th day of July, 1884, the plaintiffs were the owners of certain land on which, on the 25th day of July, 1883, they had given a mortgage to the Colonial and United States Mortgage Company for \$2,530 drawing interest, payable annually, at the rate of 6½ % per annum, which said mortgage was due December 1, 1888; that said mortgage was duly recorded; that on said July 14, the plaintiffs, desiring more money, applied to defendant, and he loaned them \$2,970, paying them \$2,867.70, and took as security their note and a mortgage on the said premises for \$5,500 bearing interest at the rate of 12 % per annum, payable annually, which said note and mortgage matured July 14, 1889; that at the time of the giving of the said mortgage, the defendant executed to the plaintiffs a bond in the sum of \$4,000, conditioned to pay off the Colonial Company's note and mortgage; that the defendant has not

paid the said note and mortgage, excepting two installments of interest of \$164.45, each, maturing December 1, 1884, and December 1, 1885; that of the first \$165.45 paid, \$102.30 was interest that had accrued on the said \$2,530 on said July 14, and was not paid to plaintiffs, but was retained by defendant and not paid till December as aforesaid, and constituted a part of the said \$5,500; that afterward, on the 30th day of July, 1885, the defendant commenced foreclosure proceedings by advertisement, assigning as a reason for such foreclosure default in the payment of the interest as provided in the note secured by said mortgage, and claiming \$6,372.04 due thereon; that at the foreclosure sale, September 11, 1885, one Daniel S. Stinson, a deputy sheriff of the county, in his own name, as deputy sheriff, and not by, or in the name of the sheriff of said county, conducted the said sale and pretended to sell the said premises to the defendant for \$6,603.28, and gave to him a certificate of sale, in his own name, as such deputy sheriff, which said certificate was afterward recorded; that prior to the commencement of said foreclosure proceedings the defendant never gave the plaintiffs or either of them any notice of his election to declare the whole of said mortgage debt due; that the said property is of about the value of \$13,000 is all the property plaintiffs have and a part of said premises is their homestead; that upon their information and belief they allege that the said foreclosure was made by the defendant for the fraudulent purpose of depriving them of their property, and the defendant refuses to permit them to redeem except upon the payment of said \$6,603.28, with interest, leaving the property incumbered by said first mortgage which defendant refuses to pay off; that by reason of the foregoing facts plaintiffs are unable to sell said premises except at a great sacrifice, or to make a loan thereon with which to redeem or pay off said incumbrance; that the plaintiffs offer in case it shall be adjudged that they are not entitled to have the said foreclosure proceedings declared invalid, to pay to the defendant to redeem said premises such sum as shall be found to be due, and if that sum does not include the \$2,530 mortgage they will surrender to defendant the said bond.

A copy of the mortgage was attached to the complaint and made a part thereof, and was conditioned that if the parties of

the first part, their heirs, executors or administrators should pay or cause to be paid to the said party of the "second part, his heirs and assigns, the full sum of \$5,500, according to the tenor and effect of their one promissory note bearing even date herewith \* \* \* due July 14, 1889, bearing interest at the rate of twelve per cent per annum, interest payable annually, then these presents to be void, otherwise to be and remain in full force. \* \* \*

And in case default shall be made in the payment of the said sum of money or any part thereof, at the time or times above specified for the payment thereof, \* \* \* then and in either case, the whole, principal and interest, of said note shall, at the option of the holder thereof, immediately become due and payable, and it shall be lawful in such case for the said party of the second part, his heirs, executors, administrators or assigns, to grant, bargain, sell, release and convey the said premises, with the appurtenances thereunto belonging, at public auction in the manner now or that may hereafter be provided by law" for the purpose of satisfying the said indebtedness. The balance of the mortgage relates to the execution of the power of sale and the distribution of the proceeds which is not material to the questions involved.

There was a memorandum attached to the mortgage, which stated the items that went to make up the \$5,500, and contained an agreement on the part of Davis to pay off the first mortgage on or before its maturity; to save the parties of the first part harmless as against it or any interest thereon, and in the event he should fail so to do then the amount unpaid should be deducted from the \$5,500. The agreement recited the fact that the \$5,500 was to draw interest from date at the rate of twelve per cent.

The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer and entered judgment dismissing the action, whereupon the defendant appealed.

*Boyce & Boyce*, for appellants.

To entitle a party to foreclose by advertisement there must be a power of sale in the mortgage and a default in some of its conditions. §§ 597, 598, C. C. Pro.; *Everitt v. Buchanan*, 2 Dak. 249, 267; *Hickey v. Richards*, 3 id. 345, 20 N. W. Rep. 428.

Under an identical statute in Michigan, see *Hebert v. Bulte*, 42 Mich. 761, 4 N. W. Rep. 215; *Doyle v. Howard*, 16 Mich. 261; *Butler v. Ladue*, 12 id. 173. There was no default. From the language used the whole debt could not be declared due on the failure to pay an installment of interest. The mortgage is conditioned for the payment of interest, but not before the maturity of the principal. *Brodribb v. Tibbetts*, 58 Cal. 6.

There was no interest due. The contract was usurious. § 1100, C. C.; *Wood v. Cuthbertson*, 3 Dak. 328, 21 N. W. Rep. 3. It is enough to establish usury if there was a greater compensation than twelve per cent; it matters not how it was to be received. *Tyler, Usury*, 101; *Lee v. Peckham*, 17 Wis. 394; *Fiedler v. Darren*, 50 N. Y. 437; *Bank v. Owens*, 2 Pet. 535; *Cattle v. Hadlox*, 16 N. W. Rep. 841; *Muir v. Newark*, 1 C. E. Gr. 537; *Dunham v. Dey*, 13 Johns. 45. A computation shows appellants were to pay to respondent \$139.15 per annum more than he was to pay to the first mortgagee, and there was no consideration for this except the \$2,970 loan, which drew the highest rate of interest allowed by law.

Respondent gave to appellants no notice of his election to declare the whole amount due, other than by the publication of the notice of sale. The foreclosure was invalid for that reason. *Basse v. Gallagher*, 7 Wis. 442; *Marine Bank v. International Bank*, 9 id. 57.

If the sale and certificate are made by the deputy it must be in the name of the sheriff. *Wilson v. Russell (Dak.)*, 31 N. W. Rep. 645; *Albrecht v. Long*, 25 Minn. 163; *Robinson v. Hall*, 5 Pac. Rep. 763; *Anderson v. Brown*, 9 Ohio, 151; *Rowley v. Howard*, 23 Cal. 401; *Paddock v. Cameron*, 8 Cow. 212; *Jordon v. Terry*, 33 Tex. 680; *Murphree*, § 76; *Rorer*, Jud. S., § 942.

The foreclosure proceedings were void as they were for an amount grossly in excess of what was due. If he had the right to foreclose at all, it would be for the amount he had advanced and interest only. *Garnsey v. Rogers*, 47 N. Y. 233; *Freeman v. Auld*, 44 Barb. 14; *Fister v. Otis*, 3 Pinney, 78 Jones, Mort., § 1801.



*Coughran & McMartin* (*Bailey & Davis* of counsel), for respondent.

There was an option to declare the whole debt due on a default in the payment of the interest. *Scheibe v. Kennedy*, 64 Wis. 564, 25 N. W. Rep. 646; *Richard v. Holmes*, 18 How. 143; *West Branch Bank v. Chester*, 11 Pa. St. 282; *Pope v. Duran*, 26 Ia. 233; *Jones*, §§ 1176, 1179, 1180.

The mortgage required no notice of election to be given. In such case none is necessary. *Jones*, § 1182; *Buchanan v. Berkshire Ins. Co.*, 96 Ind. 510.

Usury does not invalidate a contract. Appellants could acquire no standing in a court of equity until they had offered to pay what was due. There is no allegation of usury, and nothing in the complaint from which a corrupt intent or agreement for usury can be inferred.

The notice, sale and certificate were sufficient. § 601, C. C. Pro.; *Maxwell v. Newton*, 65 Wis. 261; *Lee v. Clary*, 38 Mich. 227.

There was no offer to redeem. *Jones*, § 1095.

By the COURT:

1. This was a contract by which the defendant, in effect, loaned the plaintiff \$5,500 by assuming to pay a prior mortgage of \$2,632.30 and paying the remainder to them in cash. The mere fact that he did not, and could not, immediately pay off the mortgage which bore a lower rate of interest, cannot be construed to make defendant's contract usurious.

2. The sale at foreclosure by the deputy sheriff, while perhaps irregular in not using the name of his principal, was valid.

3. No further notice was necessary.

4. There was, under the terms of the mortgage, a breach of its conditions by a failure to pay interest as specified in the note.

The judgment is affirmed, all of the justices concurring.

REPORTER:—A petition for a rehearing was filed, and a rehearing denied at the May Term, 1888.



TERRITORY, ETC., Respondents, v. MCPHERSON ET AL., Appel-  
lants.

1. Parties, Improper — How Raised — Mandamus.

The objection that the territory is improperly a party plaintiff in a *mandamus* proceeding cannot be raised by demurrer.

2. Same — Real Party in Interest.

Under § 696, C. C. Pro., which provides that the writ of *mandamus* "must be issued \* \* \* upon the application of the party beneficially interested," one engaged in the retail liquor business, and having property invested therein, has such interest as makes him a proper party plaintiff in proceedings to compel the county commissioners to fix the license for carrying on that business. The territory in such case is also beneficially interested.

3. Mandamus — When it Lies.

Where a board of county commissioners in the discharge of its duties had fixed certain licenses under a wrong statute, *held*, *mandamus* would lie to compel it to fix them under the right statute.

4. Statutes — Repeal — Special — General — Construction.

During the existence of a general statute, § 3, chap. 26, Laws 1879, authorizing boards of county commissioners to fix liquor licenses "at the rate of not less than \$200, nor more than \$500 per year," a statute was passed incorporating a certain city, which contained a provision in its charter, that the board of county commissioners of the county in which the city was located should not, within the limits of the city, exact a license for that business to "exceed \$150 per year." After this, the general statute was amended, chap. 71, Laws 1887, so that the rate was required to be "not less than \$500, nor more than \$1,000 per annum," and "all acts and parts of acts inconsistent" therewith were repealed. *Held*, that the charter provision was not repealed.

(Argued and determined at the February Term, 1888.)

A PPEAL from the district court, Lawrence county; Hon.  
CHARLES M. THOMAS, Judge.

This was a *mandamus* proceeding by the territory on the relation of Ben. Baer and Harris Franklin, copartners, as Franklin & Baer, plaintiffs, against D. A. McPherson, S. B. Crist and F. M. Allen, as the board of county commissioners of the county of Lawrence, Dakota Territory, defendants, to compel them, as such board, to fix the amount of the county retail liquor license in the City of Deadwood, Lawrence county. The court below having overruled a demurrer to the alternative writ granted the relief asked. The questions here presented arise on the action of

the court in overruling this demurrer. From the alternative writ it appeared that the relators were, July 7, 1887, electors and tax payers of the city of Deadwood, county of Lawrence, Territory of Dakota, and had been in the business of retail liquor dealers there for three years, during which time, being considered by the board of county commissioners of said county proper persons to engage in the said business, they had been licensed to carry on the same; that they had a place for such business in said city and a large stock in trade; that the business was profitable to them; that they desired to continue the same, and desired and intended to apply to said board for a license for said business from July 1, 1887, to January 1, 1888, according to the practice, and were ready and willing to pay therefor such legal license fee as may be fixed by said board, not to exceed \$150 per annum; that from the organization of said city until the term commencing January 1, 1886, said board had fixed the license in said county, not included in said city, at \$250 per annum, and in the city at \$125 per annum, while the city also charged a license of \$125 per annum; that since the 1st of January, 1886, the said board had fixed the said license outside of said city at \$200 per annum, and in the city at \$150 per annum, while the city had charged \$100 per annum; that on the 21st day of June, 1887, said board fixed said license in Lawrence county generally, from and after the 1st day of July, 1887, at the rate of \$500 per annum, and refused to fix the license to be paid said county within the limits of the City of Deadwood at a sum not exceeding \$150 per annum, though requested so to do by the relators.

At the return time the defendants demurred to the writ on the following grounds: 1. The territory is not the real party in interest. 2. That the relators have no such beneficial interest as entitles them to maintain this proceeding. 3. The act sought to be compelled is not one compellable by this proceeding. 4. That by law the lowest license that could be fixed by defendants is \$500. The court overruled the demurrer, and the defendants having elected to stand on it, final judgment was entered directing them to fix the license in the city at an amount not exceeding \$150 per annum, whereupon they appealed to this court.

The general statutes involved will be found stated in the head-

notes. The special provision in the charter of Deadwood (§ 89), passed February 22, 1881, was as follows: "That the license imposed by the county commissioners of Lawrence County on any person or firm for the sale of intoxicating liquors within the limits of said City of Deadwood shall not exceed one hundred and fifty dollars per annum."

*W. L. McLaughlin* (*W. E. Church* of counsel), for appellants.

The territory was an improper party. Chap. 43, L. 1883, p. 63; *People v. Pacheco*, 29 Cal. 210; *People v. County*, 40 id. 450. *Mandamus* is similar to an action at law. High, §§ 4, 8; *Com. v. Dennison*, 24 How. 66; *Gilman v. Bassett*, 33 Conn. 298; *McBane v. People*, 50 Ill. 503.

The right to the writ was not complete, but inchoate and uncertain. High, § 10; *People v. Brooklyn*, 1 Wend. 318. There was no individual duty due relators specially enjoined by law. §§ 695, 696, C. C. Pro.; *County v. Keller*, 85 Ill. 396; High, § 10. The right was not clear and undoubted. *Moses*, p. 17; High, § 9; *People v. Forquer*, Breese, 114; *People v. Hatch*, 33 Ill. 140; *People v. Village*, 93 id. 186.

The charter provision was repealed by chap. 71, L. 1887. *Pierrepoint v. Church*, 10 Cal. 315; *People v. Burt*, 43 id. 561; *People v. Sargent*, 44 id. 43; *Kellogg v. City*, 14 Wis. 678; *State v. Severance*, 55 Mo. 378; *State v. Miller*, 1 Vroom, 368; *People v. Morris*, 13 Wend. 325; *Sloan v. State*, 8 Blatchf. 361.

*McLaughlin & Steele*, for respondents.

The question of parties cannot be taken by demurrer. *Phoenix Bank v. Donnell*, 4 N. Y. 412; *Bank v. Magee*, 20 id. 362; *Barclay v. Quicksilver M. Co.*, 6 Lans. 30. The forms abolished by § 33, C. C. Pro., are those in actions at law and suits in equity; *mandamus* is neither. *Chinn v. Trustees*, 32 Ohio St. 237. That it was proper to use the name of the territory, see *State v. Commissioners*, 5 Ohio St. 502; *State v. Brown*, 38 id. 344; *Chance v. Temple*, 1 Ia. 79.

When the board acted on the question of license it was required to act as to the whole county. *Board v. McComb*, 92 U. S. 541. *Mandamus* was the proper remedy. *Mayor v. Furze*, 3 Hill,

614; Napa V. R. R. Co. v. Napa County, 30 Cal. 437; Thomas v. Armstrong, 7 id. 287; Humbolt v. Churchli, 6 Nev. 30; People v. Supervisors, 28 Cal. 431; State v. Reynolds, 25 N. W. Rep. 611; Warner v. Village, 28 id. 844. Respondents could maintain this proceeding from their interest as electors and tax payers, but here from their business they had a special interest. Hall v. Union P. R. R. Co., 3 Dill. 523; Union P. R. R. Co. v. Hall, 91 U. S. 355, 428; People v. Collins, 19 Wend. 65; Humphrey v. Mayor, 28 Am. Rep. 446; State v. Mastley, 24 N. W. Rep. 201; People v. Auditor, 42 Mich. 428; State v. Commissioners, 5 Ohio St. 496; People v. Supervisors, 56 N. Y. 252.

The general statute is controlled by the special one, the charter. Potter Dwarris, 131; People v. Wells, 11 Cal. 339; Fox v. Rockford, 38 Ill. 451; Western Bank v. Tallman, 17 Wis. 532; U. S. v. Tynen, 11 Wall. 93; Henderson's Tobacco, id. 657. There is no conflict; they can be construed together. Stoll v. State, 17 Wall. 436. There was no conflict before the amendment; after it the effect was the same as if the original statute had passed fixing the rates as at present, and the original law and its rates never had any application to the city. There is no inconsistency between the two acts. Dill. Mun. Corp., § 87; Fosdick v. Perrysburg, 14 Ohio St. 486; Janesville v. Markoe, 18 Wis. 350; State v. Stevenson, 44 N. J. L. 371; Conners v. Carp. R. I. Co., 54 Mich. 171; State v. Stoll, *supra*; Schwencke v. Union D. & R. R. Co., 7 Colo. 514; Whipple v. Christian, 80 N. Y. 525; Third National Bank v. Harrison, 8 Fed. Rep. 722; Cole v. Supervisors, 12 Ia. 552; Wood v. Commissioners, 58 Cal. 563; Albertson v. State, 2 N. W. Rep. 748; Brown v. County, 21 Pa. St. 43; Ottawa v. County, 12 Ill. 339; Townsend v. Little, 109 U. S. 512.

By the COURT :

The judgment in this case is affirmed.

1. The objection that the territory was improperly joined as a party should have been taken by answer. The public and the relator, however, in this case seem both to be beneficially interested, and the relator is a proper party plaintiff.

2. The county board having undertaken to act could be compelled to complete its action by fixing the license in the City of Deadwood not to exceed the amount provided by the charter.

3. The general act, chap. 71, L. 1887, fixing the maximum and minimum rates of county licenses, did not repeal the provision of the city charter fixing the license therein not to exceed \$150. All of the justices concur.

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SANDAGER, Appellant, v. WALSH COUNTY, Respondent.

**Stare Decisis — Office and Officer — Compensation.**

A county treasurer is not entitled to commission on money received on the sale of bonds for the erection of a court-house, although the statute, § 15, chap. 39, Pol. C., as amended, chap. 20, L. 1879, fixing the same on which he is to have commission as compensation for his services, uses this language: "In computing the amount collected, for the purpose of charging percentage, all sums from whatever source derived, shall be included together." So *held*, on the authority of *Territory v. Cavanaugh*, 8 Dak. 325.

(Argued and determined at the February Term, 1888.)

**A** PPEAL from the district court, Walsh county; Hon. W. B. McCONNELL, Judge.

This was an action by P. E. Sandager against Walsh county to recover certain commissions. The court below sustained a demurrer to the complaint, and the question here presented was the sufficiency of the complaint to constitute a cause of action. It alleged that the defendant county was a public corporation, and that during the periods mentioned therein plaintiff was its treasurer; that on the 25th of May, 1885, it issued its bonds for \$25,000, to build a court-house and jail; that on or about the 30th of June, 1885, the bonds were sold by the board of county commissioners of said county for \$25,051, and said sum was paid over to the plaintiff as such treasurer; that plaintiff, as such officer, on or about the 30th of December, 1885, had duly disbursed the whole of said sum at the direction of said county, and that said county thereupon became and was indebted to the plaintiff for \$1,002.04, being four per cent of said amount; that he had duly presented a claim to said county for such amount and it had rejected the same, and that the same was wholly unpaid. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The

court sustained the demurrer, and the plaintiff electing to stand on his complaint, a judgment of dismissal was entered and the plaintiff appealed.

The statute under which the commission was claimed is stated in the head-note.

*Noyes & McLaughlin*, for appellant.

The demurrer was sustained on a *dictum* found in *Territory v. Cavanaugh*, 3 Dak. 325. Commission is allowed on this fund as well as any other; there is no qualification in the statute. General words are to receive a general construction; if there is no express exception the court can create none. *Demarest v. Wynkoop*, 3 Johns. Ch. 142; *People v. N. Y. C. R. R. Co.*, 13 N. Y. 80; *Story, Conf. L.*, p. 10.

*C. A. M. Spencer*, for respondent.

Appellant was not entitled to the commission. *Territory v. Cavanaugh*, 3 Dak. 325. Any question arising in a case that is discussed and decided is not *dictum*, but adjudication. 5 Md. 488; 26 id. 261.

By the COURT:

This case is affirmed under the authority of *Territory v. Cavanaugh*, 3 Dak. 325. While in that case the proposition was not necessarily before the court for determination, yet, in the view finally taken of the case, the question must have been fully considered by the court, and in consideration of the reliance placed on the decision by the legislature, courts and individuals since its rendition, it is not deemed advisable to again examine the question involved. All the justices concur.

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BOUTON, Respondent, v. HAGGART, Appellant.

**Chattel Mortgages — Crops — Assumption — Validity — Creditors.**

Where, to secure the purchase-money for certain land, the purchasers gave a chattel mortgage on the crops to be raised on the land the ensuing season, and the mortgage was duly filed for record in conformity to statute, but before the crop was sowed the purchasers sold the land to M., and he, as a part of the consideration, assumed the payment of the mort-

gage by parol and agreed that it should be and remain as binding a lien upon the crop to be raised as if no change in ownership had taken place, *held*, that the mortgagee had no right to the crop as against M.'s creditors, although they knew of the mortgage prior to the rendition of the judgment under which their rights attached.

(Argued and determined at the February Term, 1888.)

**A** PPEAL from the district court, Cass county; Hon. W. B. McCONNELL, Judge.

This was an action for the conversion of certain grain by C. D. Bouton against John E. Haggart, sheriff. The case was submitted to the court below upon the pleadings and an agreed state of facts, from which it found that Redmon & Fish, on the 4th of April, 1884, bought from the plaintiff (or contracted for) certain land in that county; that in part payment for it they gave him two promissory notes, one for \$3,000 and the other for \$2,880, both dated April 4 and due November 1, 1884 and 1885, respectively; that to secure the payment of these notes they executed to him the same day a chattel mortgage on "all the crop to be sown, grown and harvested" on the land sold to them (and which they then owned and were in possession of), and the mortgage was duly filed for record the same day; that the plaintiff was the owner and holder of the notes and the mortgage, and that they were due and unpaid; that on the 7th of April, 1884, and before the crop was sown, Redmon & Fish assigned to D. W. McKay the contract for the purchase of the land that they had received from the plaintiff; that said McKay in consideration thereof "agreed that said mortgage should be and continue a valid lien upon the crops to be raised on said premises to the same extent and as fully as though said assignment from Redmon & Fish had never been made;" that after the assignment of said contract, and during the year 1884, said D. W. McKay and one G. H. McKay, who knew of the mortgage, seeded a part of said land and raised three thousand four hundred bushels of wheat thereon; that on the 2d day of October, 1884, the defendant, as sheriff, with an execution, in the case of Kelly & Co. against said D. W. & G. H. McKay, levied upon said wheat and took and converted it to his own use; that the wheat at the time he took it was of the value of \$1,900; that the said defendant, prior to the said



levy, did not tender or pay to the plaintiff, in any manner, the amount of his said mortgage or any part thereof; that said Kelly & Co. had notice of said mortgage prior to the rendition of the judgment upon which their said execution issued. As conclusions of law the court found that the plaintiff's mortgage was a valid and subsisting lien upon the wheat; that the defendant wrongfully took the same, and that the plaintiff was entitled to judgment against him. On the rendition of the judgment the defendant appealed.

*H. F. Miller*, for appellant.

Redmon & Fish having sold their interest in the land before the crop was seeded, Bouton never acquired any lien upon it, unless it was by the agreement of McKay. This was not in writing, not witnessed nor filed, and Bouton was not a party to it. It did not pretend to create a new lien, but to bring into life an old, not as to the mortgagors, but a third party. The mortgage and agreement were void as to creditors. C. C., §§ 1704, 1744; *Jones v. Richardson*, 10 Metc. 481; *Frost v. Willard*, 9 Barb. 440; *Single v. Phelps*, 20 Wis. 419; *Mowry v. White*, 21 id. 422; *Curtis v. Wilcox*, 13 N. W. Rep. 803.

*D. H. Twomey*, for respondent.

A mortgage on a crop not yet sown is valid. § 1704, C. C. A party may mortgage any thing in which he has a potential interest. *Jones*, Chat. Mort., § 140; *Argues v. Wesson*, 51 Cal. 620; *Butt v. Ellett*, 19 Wall. 544; *Mayer v. Taylor*, 69 Ala. 403, 44 Am. Rep. 522; *Miller v. Chapel*, 29 N. W. Rep. 52; *Hull v. Hull*, 48 Conn. 250, 40 Am. Rep. 165; *White v. Thomas*, 52 Miss. 49; *Wyatt v. Watkins*, 30 Am. Rep. 63. The crop had a potential existence at the time the mortgage was given, for Redmon & Fish owned the land on which they proposed to raise it. The mortgage was good as against the world after it was filed. C. C., § 1744; *Wyatt v. Watkins*, *supra*. McKay was bound by his assumption of the mortgage. *Ely v. McKnight*, 30 How. Pr. 101; *Wilson v. King*, 23 N. J. Eq. 150; *Brown v. Kurtz*, 37 Ia. 240; *Kellogg v. Second*, 3 N. W. Rep. 868; *Hathorn v. Lewis*, 22 Ill. 395. An assumption need not be in writing. *Brown v.*



Kurtz, *supra*; Thompson v. Dickinson, 12 N. Y. 371; Putney v. Farnham, 27 Wis. 189; Jones, §§ 740, 750; Wilson v. King, 23 N. J. Eq. 150; Jones, Chat. Mort., § 488. The assumption did not destroy the notice imparted by filing. McKay's creditors were bound by the mortgage. Everman v. Robb, 52 Miss. 653.

By the COURT:

The judgment in this case is reversed on the ground that the mortgage of Redmon & Fish upon crop to be grown was an agreement to mortgage, and not a mortgage; and the court erred in holding that it could be assumed and given effect to as a mortgage by a third party by parol. All the justices concur.

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FISK ET AL., Respondents, v. STONE, Appellant.

1. Pleading — Complaint — Guaranty — Sufficiency.

Where a complaint against a guarantor alleged that the defendant, in consideration that the plaintiffs would sell one H. certain goods, promised to be answerable for the same to an amount not exceeding \$300; that on the faith of said promise they did sell to said H. goods of the reasonable value of \$442.66; that H. had not paid for the same, excepting \$103.63, though requested so to do; that notice of demand on H. and non-payment had been given to the defendant; that demand of payment of \$300 had been made upon him, and that he had not paid the same, *held*, that the complaint stated a cause of action.

2. Guaranty — Absolute — Notice — Waiver.

The defendant gave H. the following letter of guaranty, which was by her transmitted to the plaintiffs: "D. B. Fisk & Co. \* \* \* Gentlemen: \* \* \* Mrs. Hollenbeck is a friend of mine. \* \* \* I think she is deserving of aid and assistance, and I am willing to give it. \* \* \* I told her I thought you would let her have goods — a sale, not a commission — to be paid for as fast as sold, provided you were assured of your money without loss by guaranty from a party whose guaranty you were willing to accept. If you will send her goods as she may order, not exceeding \$300 due you at any one time, I will guarantee that you are paid in full. \* \* \* George W. Stone." *Held*, that this was an absolute guarantee, and that no notice of acceptance was necessary to render the defendant liable. But if the letter were construed as an offer of guarantee, the defendant, having communicated it through the debtor, waived the right of notice of acceptance to himself.

3. Same — Compliance.

Where under such letter the plaintiffs sent the debtor goods at one time on her order to the amount of \$302.41 on a credit of four months, that be-

ing their usual time, *held*, they did not exceed the guaranty so as to entirely discharge the defendant.

(Argued and determined at the February Term, 1888.)

**A** PPEAL from the district court, Turner county; Hon. C. S. PALMER, Judge.

This was an action by D. B. Fisk, D. M. Fisk and J. E. L. Frasher, copartners, under the name of D. B. Fisk & Co., against George W. Stone, defendant, on an alleged guaranty. The complaint charged that on the 25th of April, 1884, in consideration that plaintiffs would sell to one Mrs. L. B. Hollenbeck certain goods to be thereafter ordered by her, he promised to be answerable for the payment of the same to an amount not exceeding \$300; that on the faith of said guaranty plaintiffs did thereafter sell and deliver to said L. B. Hollenbeck goods of the reasonable value of \$442.66; that she had not paid for the same excepting \$103.63; that the payment of the balance had been demanded of her, but she had not paid the same; that notice of the demand and non-payment had been given to the defendant; that on the 18th of October, 1884, they demanded the payment of \$300 of said indebtedness from the defendant, and that he refused to pay the same or any part thereof. The defendant answered denying all of the allegations of the complaint. On the trial the defendant objected to the introduction of any evidence under the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The court overruled the objection, and the defendant excepted. The plaintiffs then read in evidence a letter of April 18, 1884, to them from Mrs. Hollenbeck, in which she said she intended going into the millinery business at Parker, Dak.; that she would like goods "on time;" that she had "moneyed friends" there "who will guarantee all goods sent to me will be settled for satisfactorily to yourselves." On the receipt of plaintiffs' reply to this, she again, April 27, 1884, wrote them ordering certain goods, and inclosed the following letter from the defendant:

"PARKER, DAKOTA, *April 25th*, 1884.

"D. B. FISK & Co., CHICAGO, ILL.:

"GENTLEMEN:—Yours 23d to Mrs. Hollenbeck, handed me. Mrs. H. is a friend of mine, who has been thrown on her own re-

sources, and pluckily intends to support herself. I think she is deserving of aid and assistance, and I am willing to give it. I told her I thought you would let her have goods, a sale, not a commission, to be paid for as fast as sold, provided, you were assured of your money, without loss, by guaranty from a party whose guarantee you were willing to accept. If you will send her such goods as she may order, not exceeding Three Hundred (300) Dollars due you, at any one time, I will guarantee that you are paid in full. Her intention is to start small and increase with the business. If at any time, I should deem it necessary to increase the amount above \$300.00, I can then do so. For my standing, would refer you to Bradstreet, Dun & Co., Sioux Nat'l Bank, Sioux City, Iowa, or First Nat'l Bank, Canton, Dak.  
\* \* \* I remain Yours Truly,                      GEO. W. STONE."

One of the plaintiffs testified that upon the receipt of this letter of guaranty from Mrs. Hollenbeck they replied, accepting it as satisfactory, and on the faith of it sent her the goods she ordered, which amounted to \$302.41. Afterward they sent her other small bills, all amounting to \$442.66; and that the goods were reasonably worth that amount; that she was given four months credit on these purchases, that being the time usually given in such cases; that her account fully matured September 1, 1884; that she had paid \$103.63 on the same; that she afterward went to Nebraska; that they had sent the account there for collection, and it had been returned uncollected; that in October, 1884, the plaintiffs notified defendant and drew on him for \$300, but the draft had been returned unpaid. Thereupon the plaintiffs rested, and defendant requested the court to direct a verdict in his favor. The court denied this request, and the defendant excepted. The defendant offering no evidence, the plaintiffs requested the court to direct a verdict in their favor. The court granted the request, and the defendant excepted. After the denial of a motion for a new trial and the entry of final judgment, the defendant appealed.

*E. C. Kennedy*, for appellant.

The complaint is insufficient: 1. The guaranty was not entered into at the time of the original obligation and there was no dis-

tinct consideration. §§ 1651, 906, C. C. 2. It alleges merely an offer of guaranty, and there was no acceptance.

The guaranty was not absolute. §§ 1654, 1649, 1659, C. C. Under this letter notice of acceptance within a reasonable time was necessary. 2 Pars. Cont. 12; Brandt, Surety, § 157; Edmondston v. Drake, 5 Pet. 624; Douglas v. Reynolds, 7 id. 113; Lee v. Dick, 10 id. 491; Adams v. Jones, 12 id. 213; Louisville M. Co. v. Welch, 10 How. 475; Davis v. Wells, 104 U. S. 159; Davis S. M. Co. v. Richards, 115 id. 524; Furst & B. M. Co. v. Black, 12 N. E. Rep. 504; Gardner v. Lloyd, 2 Atl. Rep. 562; Wilcox v. Draper, 10 N. W. Rep. 579; Russell v. Clark, 7 Cr. 90; Davis S. M. Co. v. Mills, 8 N. W. Rep. 356.

The terms of the guaranty, in extending the credit four months and exceeding \$300, were exceeded. §§ 1666, 1696, C. C.; Brandt, § 158; Fellows v. Prentiss, 3 Denio, 512; Hunt v. Smith, 17 Wend. 179; Walrath v. Thompson, 6 Hill, 541; Russell v. Clark, *supra*; First Nat. Bank v. Hale, 11 Otto, 50; Lee v. Dick, *supra*.

*Geo. H. Hand and J. H. Teller, for respondents.*

The complaint shows that the goods were sold on the faith of the guaranty. That is sufficient. § 1651, C. C.; Davis v. Wells, 104 U. S. 159; Wells v. Mann, 45 N. Y. 327; Leonard v. Vreedenburg, 8 Johns. 29; 1 Pars. 497; § 906, C. C.; Langdell, Cas. Cont. 987; DeColyer, Guar. 4.

Appellant's construction of the letter is based upon a *dictum* in Russell v. Clark, 7 Cr. 90. That is not now sustained by authority, and has been denied by that court. Drummond v. Prestman, 12 Wheat. 515. See, also, Mason v. Pritchard, 12 East, 227; Hargrave v. Smee, 6 Bing. 244. Guaranties are to have a reasonable construction in view of all of the circumstances. Beloni v. Freeborn, 63 N. Y. 383; Brandt, 105; Davis v. Wells, *supra*. Under this rule this was an absolute guaranty. Moline P. Co. v. Gilbert, 3 Dak. 239; Wilcox v. Draper, 10 N. W. Rep. 579; Caton v. Shaw, 2 H. & G. 13; Crittenden v. Fisk, 8 N. W. Rep. 714; Crittenden v. Dana, 6 Hill, 543; § 895, C. C.; Bell v. Bruen, 1 How. 169; Gales v. McKee, 13 N. Y. 231; Heffield v. Meadows, 4 C. P. 595; Allen v. Kenning, 6 Bing. 618; Lawrence

v. McCalmont, 2 How. 429; Douglas v. Howland, 24 Wend. 35; Powers v. Bumcratz, 12 Ohio St. 272; Wade, Notice, § 404.

The giving a credit that discharges a guarantor is such as changes the contract. Louisville M. Co. v. Welch, 10 How. 46. Credit was the object of the guaranty. The \$300 was a limitation, not a condition of liability. § 1650, C. C.; Power v. Bumcratz, *supra*; Crittenden v. Fisk, *supra*; Bent v. Hartshorn, 2 Metc. 24. The vice of appellant's position here again is his erroneous construction of the latter.

The defendant sent this letter through the agency of the debtor. There was immediate notice of acceptance through that source. This is sufficient if it were a mere offer of guaranty as contended. Wilcox v. Draper, *supra*.

By the COURT:

The judgment is affirmed.

1. The case discloses the fact that the guaranty was intended to be absolute.

2. That, if an offer of guaranty, the defendant by his conduct waived the right of notice.

3. The terms of the guaranty were complied with.

4. The complaint was sufficient. All the justices concur, except FRANCIS, J., who dissents.

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TERRITORY, ETC., Respondent, v. BOARD OF COUNTY COMMISSIONERS  
OF CASS COUNTY, Appellant.

**Counties — Officers — Powers.**

The board of county commissioners has the power to change the boundaries of the commissioner districts of the county.

(Argued and determined at the February Term, 1888.)

**A** PPEAL from the district court, Cass county; Hon. W. B. McCONNELL, Judge.

This was a proceeding in *mandamus* by the Territory on the relation of Chas. F. Templeton, attorney-general, plaintiff, against the board of county commissioners of Cass county, defendant, to compel it to recognize the commissioner districts as established

under chap. 33, Special Laws, 1883, as the districts of the county. It appeared that Cass county was organized in 1873; that on the 28th of March, 1883, the county had been divided into five commissioner districts by the commission created under that act; that on the 23d of September, 1884, the board of county commissioners of the county finding that the boundaries of districts 4 and 5, in some instances, conflicted with certain civil township organizations, which, under section 120, chapter 112, Laws 1883, were made election precincts, "thus disfranchising legal voters in the choice of their district commissioners," changed the boundaries of these two districts; that on the 3d of January, 1887, said board, at a regular session, passed a resolution prescribing the boundaries of all of the districts which were different from those fixed by the commission; that on the 26th of September, 1887, the July session of the board having been regularly continued to that time, re-adopted their resolution of January 3d, as some doubts as to its validity had been expressed. At the hearing on the return to the alternative writ, the court, finding the facts as above, concluded that the action of the board on the 23d day of September, 1884, the 3d day of January, 1887, and the 26th day of September, 1887, "was, upon each and all of said occasions, without warrant of law and void" and that the plaintiff was entitled to a peremptory writ of *mandamus* commanding said board "to recognize in all of their proceedings the commissioner districts as limited, bounded and defined by the resolution and authority of the commission, established, created and acting under the Special Laws of 1883."

After the entry of final judgment the defendant appealed.

*A. D. Thomas*, for appellant.

The board had the power to change the boundaries of the districts. See §§ 1, 2, chap. 4, L. 1868-9; §§ 1, 2, 3, 4, 6, chap. 27, L. 1874-5; §§ 4, 15, 16, 18, chap. 21, Pol. C.; chap. 40, L. 1885. A mere change in the phraseology of these successive statutes raises no presumption of an intent to change the law. *McDonald v. Hovey*, 110 U. S. 619, 4 Sup. Ct. Rep. 142; *State v. MacColl*, 9 Neb. 203, 2 N. W. Rep. 213; *Fullerton v. Spring*, 3 Wis. 667; *Wright v. Oakley*, 5 Metc. 400. From the organization of the county till the revision in 1877, without question, the commis-

sioners could change the lines of the districts once every three years. It is equally clear their authority was continued by section 4, chapter 21, Pol. C. See, also, § 16, same chap.; §§ 21, 26, chap. 40, L. 1885. There is nothing in chapter 33, Laws 1883, inconsistent with this power. Repeal by implication is not favored. *Blain v. Bailey*, 25 Ind. 165; *Cohill v. State*, 37 id. 111; *Taylor v. Board*, 67 id. 383.

*C. B. Pollock*, for respondent.

After the organization and division of the county the commissioners had no power to change the districts. A county is a body corporate for civil and political purposes only. § 13, chap. 21, Pol. C.; *Dill. Mun. Corp.* 30, 31; *Cooley*, Const. L. 295; *Treadway v. Schnauber*, 1 Dak. 238. Its powers are not so extensive as those of a city. *Dill.* 30; *State v. Commissioners*, 25 N. W. Rep. 91. They have only the powers expressly given, and such as are essential to the objects of their creation. *Clay Co. v. Simmons*, 1 Dak. 391; *Vincent v. Nantucket*, 12 Cush. 103; *State v. Smith*, 31 Ia. 494; *Minture v. Larue*, 23 How. 435; *Dill.*, § 55; *Thompson v. Lee*, 3 Wall. 327; *Logan v. Pyne*, 43 Ia. 524. In view of these rules, chapter 21, Pol. C., chapter 33, Special Law 1883, and chapter 40, Laws 1885, are the only sources from which the power claimed can be derived. Chapter 40, Laws 1885, has no application to Cass county. It was intended for the organization of new counties. In the statutes referred to prior to the revision no such power is expressly given, nor is it by section 4, chapter 21, Pol. C. Clearly it is not in express words, nor is it incident to the powers granted, for those are to the "commissioners appointed under this act." The power is not necessary for the purposes of the corporation. Section 16, chapter 21, Pol. C., provides the districts are to "continue as now constituted until changed as provided by law." The manner of such change was afterward provided, chapter 33, Special Laws 1883, this change was had; it was different from that provided by section 4, chapter 21, Pol. C., and all inconsistent acts were repealed, appellant was, therefore, left without power to change the boundaries.

By the COURT :

The peremptory writ in this case is set aside, and the action of



the court is reversed upon the ground that the court erred in holding that the board of county commissioners had no power to change the boundaries of the commissioner districts. All of the justices concur.

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**McMAHON ET AL., Respondents, v. PLUMMER ET AL., Appellants**

**Contract — Rescission — Trial — Directing Verdict — Chattel Mortgage, Requirement to Pay.**

On an issue of the right to recover on a bank check, it appeared the check had been given by the defendants to the plaintiffs on a settlement of differences as to the right to the possession of certain personal property. The defendants contended, however, that when the check was given the plaintiffs represented that the property was in as good condition as at a prior date, whereas, in fact, it was not, and it had, by the acts of the defendant, been damaged to an amount far in excess of the check. They also contended they held a prior and paramount lien upon the property by virtue of a chattel mortgage duly recorded. At the trial it appeared the defendants were rightfully in possession of the property under proceedings in claim and delivery, and that defendants obtained possession on the settlement of the case by means of this check. It also appeared the defendants had not returned the property to the plaintiffs, or offered to do so, whereupon the court directed a verdict in favor of the plaintiffs for the amount of the check. *Held*, 1. That the direction was proper. 2. That the surrender of the possession of the property, and the dismissal of the claim and delivery action, was a sufficient consideration for the check. 3. That the fact that the defendants held a prior mortgage on the property, and the plaintiffs had taken it without paying off the mortgage as required by section 1754, C. C. (claiming it was void), would not have warranted the court in directing a verdict for the defendants.

(Argued and determined at the February Term, 1888.)

**A** PPEAL from the district court, Cass county; Hon. W. B. McCONNELL, Judge.

This was an action by E. J. McMahon and C. M. MacLaren, copartners, as McMahon & MacLaren, plaintiffs, against A. L. Plummer and A. L. Hanson, copartners, as Plummer & Hanson, defendants, on a bank check of the latter to the former for \$281. The defendants were bankers, and the check was drawn upon themselves. They admitted the execution and delivery of the check and their refusal to pay it; but "further answering and by way of counter-claim" they alleged that one C. R. Black, on and prior to the 29th of October, 1885, was doing a general mercan-



tile business at Clifford, Traill county, Dakota; that to secure his certain indebtedness he executed to them a chattel mortgage on his entire stock of merchandise, which mortgage was duly filed for record October 30, 1885; that afterward, on the 8th of November, 1885, the plaintiffs wrongfully and maliciously took from said Black said goods; that the defendants demanded them from the plaintiffs, but they refused to deliver them; that the plaintiffs falsely claimed that they had a lien upon said goods superior to the defendants; that they represented that the goods had been moved in a careful manner, and had not been injured; that the plaintiffs refused to deliver the goods to the defendants until they executed and delivered to them a check for the amount of the pretended claim or lien they claimed to have on said goods; that plaintiffs refused to permit defendants to examine the goods until the check had been delivered; that the defendants, relying upon the representations of the plaintiffs as to their pretended claim and the condition of the goods, delivered to the plaintiffs the check sued on; that afterward, and before the presentation of said check, they discovered the representations of the plaintiffs were wholly false, and that the goods had been damaged by the removal in an amount equal to twice the check. The plaintiffs, in reply, alleged that the mortgage of the defendants upon the goods was fraudulent and void as against Black's creditors; that they were attorneys doing a collecting business, and that on or about the 8th of November, 1885, certain creditors of the said Black sent to them a claim against him for collection; that for the purpose of collecting said claim they, with the consent and concurrence of said Black, took certain goods from his store; that afterward, on the 9th of November, 1885, the defendants commenced an action in claim and delivery against said Black and the creditors so represented by the plaintiffs for said goods, and took the same in said proceedings; that afterward plaintiffs, on the execution of a re-delivery bond as provided in such cases, duly obtained possession of said goods; that afterward there was a full and complete compromise, settlement and dismissal of said action between the parties hereto, and in consideration thereof and the delivery of the possession of said goods to the defendants they executed the check in suit. All allegations of misrepresentation, fraud and

damages were denied. On the trial of the case, evidence was given on these various issues; but there was nothing tending to show that the defendants had ever returned the property to the plaintiffs that they had obtained on the settlement, nor did it appear that they had ever offered to return it. It, in fact, appeared that they had sold the property in the foreclosure of their mortgage. After both parties had rested, the plaintiffs requested the court to direct a verdict in their favor on the ground that, in order to avoid the contract of compromise, the defendants ought to have put the plaintiffs in the position they were when the compromise was entered into, and as the answer and evidence showed this had not and could not be done, they were liable for the amount of the check. The defendants asked the court to direct a verdict in their favor, on the ground that the evidence showed that the plaintiffs took the property in violation of law in that they had not paid off defendants' mortgage, as required by section 1754, C. C. The court granted the request of the plaintiffs, and the defendants excepted. After the denial of a motion for a new trial and the entry of final judgment the defendants appealed.

*M. W. Greene*, for appellants.

There was a conflict in the evidence as to the material facts in the case. The court erred in directing the verdict. *Chicago, etc., R. Co. v. Griffin*, 68 Ill. 499; *Mayor v. Trimble*, 25 Md. 18; *State v. Jones*, 33 Ia. 9; *Montgomery v. Erwin*, 24 Ark. 540; *Stebbins v. Miller*, 12 Allen, 591; *Pratt v. Ogden*, 34 N. Y. 20; *Proffat, Jury*, §§ 266, 270, 316; *Chenery v. Palmer*, 6 Cal. 119; *Hadley v. Importing Co.*, 13 Ohio St. 505; *McCall v. Davis*, 56 Pa. St. 433.

It appears the possession of the property by the respondents was wrongful, in fact criminal; the court, for this reason alone, ought to have directed a verdict for appellants.

*Ball, Wallin & Smith*, for respondents.

It is well settled that it is the province of the court to determine whether or not there has been any evidence adduced tending to establish fraud, or whether or not the fraud would be available if established. *Oscanyan v. Winchester Arms Co.*, 103 U. S. 261; *First Nat. Bank v. Comfort*, 28 N. W. Rep. 855.

Contracts obtained by fraud are voidable only. §§ 877, 878, 879, C. C. A party seeking to avoid a contract must restore every thing he has received under it. §§ 964–967, C. C.; *Dunks v. Fuller*, 32 Mich. 243; 31 id. 159; 33 id. 344; *Van Trott v. Weise*, 36 Wis. 439.

In order to recover any damages, the appellants ought to have rescinded the contract wherein they gave the check.

By the COURT:

The judgment is affirmed upon the ground:

1. If the check in controversy was obtained by fraud the contract was not void, but voidable, and the defendants should have rescinded, or offered to rescind, and delivered to the defendant, the possession of the property received.

2. There was a sufficient consideration for the check in the surrender of the possession of the property and dismissal of the action.

3. The court did not err in refusing to direct a verdict for the defendants. All of the justices concur.

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RAYMOND, Respondent, v. SPIGER, Appellant.

**Appeal — Practice — Record — Bill of Exceptions.**

Where it is sought to review the trial of an issue of fact and no exceptions are brought into the judgment-roll by a bill of exceptions, case, or otherwise, the court will not examine the questions presented on a record agreed to by the parties, but will affirm the judgment from which the appeal is taken.

(Argued and determined at the February Term, 1888.)

**A** PPEAL from the district court, Codington county; Hon. BARTLETT TRIPP, Judge.

This was an action on the bond of a probate judge to recover certain money alleged to have been turned over to him as such officer and that he had not accounted for. One of the sureties only appeared and he demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, to which he excepted. Leave was given him to answer, and he interposed a general denial. There was a

jury trial, and under the instructions of the court a verdict for the amount claimed was rendered for the plaintiff. After the denial of a motion for a new trial and the entry of final judgment the defendant appealed. In this court he sought to review the action of the court below in overruling the demurrer, admitting evidence, instructing the jury and in denying the motion for a new trial. In the judgment-roll there was no statement, bill of exceptions or settlement of the case by the court or judge. Appended to the record brought up, however, was this stipulation signed by the attorneys of the respective parties. "It is hereby stipulated that the foregoing is a true and correct abstract and statement of the within case, contains all of the evidence offered and received at the trial of said cause, and we agree that the same together with the pleadings and other papers filed with the clerk of the district court of said county in said cause be received and considered upon which to base an appeal to the supreme court of this territory."

*D. C. & W. R. Thomas*, for appellant.

*Van Liew & Rowe*, for respondent.

By the COURT:

No exceptions are contained in and made a part of the judgment-roll by case, bill, or otherwise, and no error appearing on the record the judgment is affirmed, following prior decisions of this court. All of the justices concur.

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TERRITORY, Defendant in Error, *v.* GODFREY, Plaintiff in Error.

**1. Rape — Assault with Intent to Commit Felony — Indictment — Sufficiency.**

An indictment under § 292, Pen. C., prescribing a penalty for one "who is guilty of an assault with intent to commit a felony," which charged that James Godfrey, at, etc., in and upon the person of Mary Lauterbach, a female child under the age of seven years, did make an assault, and her, the said Mary Lauterbach, did ill treat, with an intent to ravish and carnally know her, the said Mary Lauterbach, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the Territory of Dakota; *held*, sufficient on objection to evidence under it, and on motion in arrest of judgment.

**2. Criminal Law—Witnesses — Competency.**

Under § 256, Crim. Pro., providing that an indictment must be set aside

when the names of the witnesses examined before the grand jury are not indorsed on the indictment, it is not error to permit witnesses whose names are not found on the indictment to testify for the prosecution on the trial.

### 3. Same — Evidence — Competency.

On an indictment for assault with intent to commit a rape on a child six years old, the court permitted the mother to testify that the child made immediate complaint of the assault, and also that she complained of pain in her abdomen. *Held*, proper.

(Argued and determined at the February Term, 1888.)

**E**RROR to the district court, Beadle county; Hon. JAMES SPENCER, Judge.

The various statutes relative to the case and the indictment are stated in the head-notes.

The court below, over defendant's objection, permitted two witnesses whose names were not indorsed on the indictment to testify in chief for the territory. The defendant had no previous notice these witnesses would be called, and he claimed, from all of the evidence brought to this court, they were two of the most important witnesses for the prosecution.

The mother of the prosecuting witness (a child six years old) testified that the child made an immediate complaint of the assault's having been made, and also complained of pain in her abdomen.

*Mouser & Vollrath* and *E. A. Morse*, for plaintiff in error.

1. The indictment does not state a public offense. § 292, Pen. C. Whether the charge is a felony or misdemeanor must appear from the indictment. *People v. War*, 20 Cal. 117. At common law an assault with intent to commit a felony was a misdemeanor. 1 Whart. Cr. L., § 645. If it was intended to charge a felony, of which the defendant was tried and convicted, the omission of the word "feloniously" was fatal. *Sullivant v. State*, 3 Eng. 400; *State v. Scott*, 72 N. C. 461; *Williams v. State*, 8 Humph. 585; *Stout v. Commonwealth*, 11 S. & R. 177; 1 Arch. Cr. Pr. (8th ed.) 1012, n.

2. The court erred in permitting the two witnesses whose names were not indorsed on the indictment to testify. §§ 209, 256, Crim. Pro. The defendant before the trial is at least entitled to be informed who will be the witnesses against him in chief. *People*

v. Quick, 25 N. W. Rep. 302; Gales v. People, 14 Ill. 435; Gardner v. People, 3 Scam. 89; Stevens v. State, 28 N. W. Rep. 304; Parks v. State, 31 id. 5. This rule was not only disregarded, but abused in this case. These were two of the most important witnesses for the prosecution, and defendant was taken by surprise.

3. Permitting the mother to relate what was said to her by the prosecutrix was error. Nothing more than the mere fact of the complaint should have been permitted. 1 Whart. Cr. L., § 566; Roscoe, 26; People v. Graham, 21 Cal. 261; 2 Russ. (6th ed.) 751; People v. McGhee, 1 Den. 21; Johnson v. State, 17 Ohio, 593.

*Chas. F. Templeton, Attorney-General*, for defendant in error.

1. The indictment was sufficient. §§ 4, 212, 214, 215, 221, 222, 223, 224, 537, C. Cr. Pro.

2. The accused had no right to be furnished with a list of the witnesses. Counsel cite authorities only from states where there is a statutory obligation to do this. A failure even to apprise him of those before the grand jury affected no substantial right. People v. Symonds, 22 Cal. 348.

3. The court allowed the mother to testify only to the fact of complaint, and of what complaint was made. Neither the conversation, nor the name of the person complained of was stated. The action of the court could be sustained under the narrowest limitation of the rule. Holst v. State, 23 Tex. App. 1. From the age of this child we are inclined to think the whole conversation was admissible. See People v. Gage (Mich.), 28 N. W. Rep. 835; People v. Brown, 53 Mich. 531; Brown v. People, 36 id. 203; McCoombs v. State, 8 Ohio St. 643; Burt v. State, 23 id. 394.

By the COURT:

1. The indictment was sufficient in form.

2. The court did not err in permitting witnesses to testify whose names were not on the indictment.

3. The court did not err in permitting the mother to testify to the fact of immediate complaint after the assault. The judgment is affirmed. All concur.

PERRY ET AL., Respondents, v. BEAUPRE, Appellant.

**Trover and Conversion — Growing Crops — Rights of Mortgagee.**

In an action of trover by a mortgagee of a crop being raised on shares, against the owner of the land who had taken possession, harvested and converted the crop to his own use under an alleged prior agreement with the mortgagor, the parties to the suit treated the owner and mortgagor as occupying the relation of landlord and tenant, and, there being evidence that the mortgage was duly filed prior to the making of the agreement under which the defendant took possession, and that the value of the share taken (after being harvested) was about equal, or exceeded the mortgagee's interest, *held*, the court properly refused to direct a verdict in favor of the defendant.

(Argued and determined at the February Term, 1888.)

**A**PPEAL from the district court, Cass county; Hon. W. B. McCONNELL, Judge.

This was an action by W. F. Perry and E. A. Perry, partners, under the name of Perry Bros., to recover of Bruno Beaupre the value of a certain crop of grain mortgaged to them, which they claimed he had converted to his own use. The plaintiffs had judgment and the defendant appealed.

The plaintiffs in their complaint alleged, that, on the 15th day of January, 1885, one L. H. Wheat executed and delivered to them his promissory note, whereby he promised to pay to their order, on the 1st day of October, 1885, \$1,068.74 with interest at the rate of 10 % per annum from date until paid; that no part of the note had been paid; that on or about the 17th day of September, 1885, the said Wheat was the owner and in the possession of a one-half interest in the crop grown and raised during that season on a certain two hundred and fifty acre tract of land therein described; that on that day, for the purpose of securing the payment of said note, the said Wheat executed and delivered to these plaintiffs a certain chattel mortgage on the crop above described; that on the said date the said mortgage was duly filed in the office of the register of deeds of the proper county; that on the 18th of September, 1885, the defendant wrongfully took said crop and converted the same to his own use; that thereafter the plaintiffs duly demanded the same from him, but he had refused to deliver it. Wherefore, they demanded judgment for the amount of the said note.



The defendant answered that he had no sufficient knowledge or information as to the making or the terms of the note to form a belief; denied that Wheat, on the 17th day of September, 1885, or for a long time prior or subsequent thereto, was the owner or in possession of the personal property described in the complaint; admitted that Wheat was in possession of the section of land described up to and until the 12th day of September, 1885, and not thereafter; "but alleges in relation to such possession that he was there solely as the tenant of this defendant for the cropping season of 1885, and had no interest in the crops so grown upon such land until the full completion of his said contract for the carrying on of said land for this defendant; that during the harvest of said year the said Wheat, by reason of employment elsewhere, became entirely unable to complete his said contract; that this defendant was compelled to take possession of said land; to employ men and teams to complete said contract; that this defendant completed the harvesting, threshing and marketing of said crop as inexpensively and expeditiously as possible, and sold the same to the best advantage at the time the said crop was ready for sale; that the one-half interest that the said Wheat was to have and possess in said crop on the completion of his contract with this defendant did not bring a sufficient sum of money to pay for the completion of said contract, but that said Wheat is still indebted to this defendant for money expended by him in the completion of his contract to carry on and cultivate said land; that he has not sufficient knowledge or information to form a belief as to whether the said Wheat executed or pretended to execute and file a mortgage upon the property described in said complaint to these plaintiffs on the 17th day of September, 1885, or at any other time, and, therefore, denies the same. Denied that the mortgage pretended to have been executed by Wheat to these plaintiffs became or was a lien upon said property therein described, or any property whatever, against or prior to the rights of this defendant, or that the same was to become a lien, if at all, upon such interest as the said Wheat might have in such crop after the contract with this defendant was completed."

Denied that he had wrongfully converted the property to his own use, but that he took the same under an agreement with said



Wheat. Admitted the demand, but denied that the property was of the value of \$1,300, or any other sum in excess of \$100.

On the trial the plaintiffs proved their note, mortgage and filing thereof; that the mortgagor early in 1885, rented a section of land, including that described in the complaint, of the defendant and agreed to cultivate it for one-half of the produce, the defendant furnishing the seed; that he went on to it and seeded the land to barley and oats (one hundred and twenty-five acres of each) and was in possession at the time of the execution and filing of the mortgage; believed that he did not move away until after the mortgage was given, that the plaintiffs took possession, harvested and sold the grain; that there were six thousand one hundred and forty-two bushels of barley and four thousand five hundred bushels of oats raised on the land; that the barley was worth thirty-five cents per bushel and the oats thirty cents a bushel. On cross-examination Wheat testified that he did not agree with the defendant that he should have a lien on his, Wheat's, part of the produce to secure the performance of his part of the leasing contract; that he did not, prior to the filing of the mortgage, inform the defendant that he would better go and take care of the crop, as he, Wheat, could get no help; that he expected to take care of the crop himself; that he did not do much toward saving the crop.

The plaintiffs then rested and the defendant moved the court to direct a verdict in his favor. This motion the court overruled. The trial resulted in a verdict in favor of the plaintiffs for \$1,280.32, and after a motion for a new trial was denied a judgment was entered on this verdict, and the defendant appealed, assigning error upon the action of the court in refusing to direct the verdict.

*H. F. Miller*, for appellant.

Plaintiffs' request to direct the verdict should have been granted because there was no evidence before the court upon which a jury could determine that any specific property had been converted by the defendant, or any conversion at all of any property in which the plaintiffs had an interest. The action is brought for the recovery of Wheat's interest in a crop grown upon a particular

tract of land. The crop covered by the mortgage was grown upon a certain two hundred and fifty acres of defendant's farm. The only evidence there was as to the amount of grain grown upon this tract is that of the witness Tuffts, and he simply testifies that from the whole farm he threshed out six thousand one hundred and forty-two bushels of barley, and about four thousand five hundred bushels of oats. There is no testimony to show how much more of the farm was seeded to oats and barley, and nothing to show what the yield per acre was. What method, then, was it possible for the jury to adopt in order to ascertain the amount of grain raised upon the tract covered by the mortgage

Wheat told the defendant that he (Wheat) was unable to complete his contract of lease, and that the defendant would have to do it, if it was done; and that afterward, and while defendant was in possession, Wheat went to plaintiffs and gave them the chattel mortgage. There can certainly be no conversion in the case so far. So far there had been no tortious act proved, and no property had been designated as the subject of the conversion. The defendant's motion should have been granted. *Thomp. "Charging the Jury,"* 14; *Davis v. Davis*, 7 Harr. & J. (Md.) 36; *Clark v. Marriott*, 9 Gill. 331; *Commissioners v. Clark*, 94 U. S., 278; *Improvement Co. v. Munson*, 14 Wall. 448; *Pleasants v. Fant*, 22 id. 120; *Parks v. Ross*, 11 How. 373; *Merchants' Bank v. State Bank*, 10 Wall. 637; *Hickman v. Jones*, 9 id. 197; *Shirby v. Vail*, 38 How. Pr. 406; *Hoeflinger v. Stafford*, 38 Wis. 391.

*A. E. Bayesen* (*A. D. Thomas* of counsel) for respondents.

The undisputed facts are these: Wheat held and occupied this section of land during the season of 1885, as the defendant's tenant under a verbal lease, by which he agreed to render as rent one-half of all the crops to be raised thereon. About the time of the execution of the mortgage to the plaintiffs, defendant entered upon the premises, took possession of all the crops growing or remaining thereon, including that mortgaged to the plaintiffs, caused the same to be threshed, removed and sold; and these acts constitute the acts of conversion for which the plaintiffs sue. The jury returned a general verdict in favor of the plaintiffs.

If there could be any complaint from an omission to show the particular amount of grain grown on the two hundred and fifty acres the defendant afterward supplied it.

All controverted questions of fact having been settled by the verdict adversely to the defendant, it follows that he never had any right in respect of the property which constitutes the subject-matter of this action beyond those rights which strictly belong to a landlord as against his tenant. That under a lease reserving as rent a portion of the crops to be raised on the demised premises, the landlord acquires no title to, or right in the crops until his portion has actually been set apart to him by the tenant, is settled by the authorities. *Deaver v. Rice*, 34 Am. Dec. 388; *Dixon v. Nichols*, 39 Ill. 372; *Sargent v. Courier*, 66 id. 245; *Townsend v. Isenberger*, 45 Ia., 670; *Blake v. Coats*, 3 G. Greene, 548; *Hatchell v. Kimbrough*, 4 Jones, 163; *Haskins v. Rhodes*, 1 Gill & J. 266; *Symonds v. Hall*, 37 Me. 354; *Larkin v. Taylor*, 2 Rawle, 11; *Rinehart v. Olwine*, 5 W. & S. 157; *Burns v. Cooper*, 31 Pa. St. 426; *Ream v. Hannish*, 45 id. 376; *Brown v. Jaquette*, 94 id. 113, 39 Am. Rep. 770; *Frout v. Hardin*, 56 Ind. 18, 26 Am. Rep. 18; *Chicago, etc., R. Co.*, 94 Ind. 319; *Larkin v. Taylor*, 5 Kan. 433; *Walls v. Peterson*, 25 Cal. 59; *Warner v. Abbey*, 112 Mass. 355.

The defendant's rights at the time in question were simply those of a creditor. In order to discharge himself from answering for the aggregate quantity, when called upon by action to respond to one of the parties whose goods he had thus intermingled, he was bound to prove the true quantity belonging to such party. *Starr v. Winnegar*, 3 Hun, 491; *The Idaho*, 93 U. S. 575; *Stephenson v. Little*, 10 Mich. 441; *Wetherbee v. Green*, 22 id. 318; *Willard v. Rice*, 45 Am. Dec. 226; *Sims v. Glazener*, 48 id. 120; *Hart v. Ten Eyck*, 2 Johns. Ch. 62; *Root v. Bonneman*, 22 Wis. 539.

The plaintiffs' mortgage covered two hundred and fifty acres of the section, one hundred and twenty-five acres of barley and one hundred and twenty-five acres of oats. From the entire section there were threshed four thousand, six hundred and twenty-three bushels of oats and six thousand, one hundred and forty-two bushels of barley. The barley was estimated to be worth thirty-

five cents and the oats thirty cents per bushel. According to appellant's basis of computation, which assumes that there were seventy-five acres of barley and seventy-five acres of oats not covered by our mortgage, the value of the crop covered by the mortgage was \$1,105.20. The defendant being a wrong-doer was not entitled to any allowance for labor performed and expenses incurred in marketing the crop. *Murray v. S. C., etc., R. Co.*, 8 N. W. Rep. 18; *Salisbury v. McKoon*, 3 N. Y. 379.

The plaintiffs were entitled, at their election, either to reclaim the grain without making compensation for the labor performed in fitting it for market, or to sue for the value thereof in its improved state.

By the COURT:

The judgment is affirmed. The pleadings of the parties, and the parties in the court below, treated the owner and occupant of the land as landlord and tenant, and this court will not now change their relation. Upon this theory of the case the court did not err in denying defendant's motion to direct a verdict and in submitting the case to a jury. All the justices concur.

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PECK, Respondent, v. LEVINGER, Appellant.

**Contracts — Validity — Public Policy — Specific Performance — Certainty — Recoupment.**

A national bank having a mortgage on the property of a corporation, and holding the greater part of its capital stock, entered into a contract with L. to sell to him the entire property of the corporation, agreeing to foreclose the mortgage and to procure title for him thereunder. The bank delivered a part of the stock under the contract and L. made several payments thereunder. The bank assigned the mortgage to P. who knew of the contract. The bank having failed, a receiver was appointed. P. commenced an action to foreclose the mortgage, making L. and the receiver parties. L. answered, asking a specific performance of the contract, or that the amounts paid by him be applied in reduction of the mortgage debt. *Held*, 1, that the contract was void on the ground of public policy; 2, that it was not sufficiently definite and certain to be specifically enforced; 3, that the payments in part performance could not be used in recoupment of the mortgage debt.

(Argued and determined at the February Term, 1888.)

**A** PPEAL from the district court, Minnehaha county; Hon. C. S. PALMER, Judge.

This was an action by Porter P. Peck, plaintiff, against the Sioux Falls Brewing Company, W. F. Furbeck, J. Leslie Thompson as receiver of the First National Bank of Sioux Falls, Moriz Levinger and others to foreclose a mortgage.

The complaint alleged the execution of the mortgage by the Sioux Falls Brewing Company to W. F. Furbeck, cashier, for the benefit of the bank, default in its conditions and its assignment to the plaintiff. It also alleged the insolvency of the bank, the appointment of the receiver, and that the defendant Levinger had, or claimed some interest in the premises, which interest was subject to this mortgage, concluding with the ordinary foreclosure prayer.

The note which the mortgage was given to secure would not mature, except for the conditions contained in the mortgage, for several years after the commencement of this action.

The defendant Levinger answered, admitting the formal execution of the note and mortgage and the appointment of the receiver, but alleged that the instruments were not given for any actual present consideration received by the brewing company, but for a prior debt of at least \$13,000 less than this amount; that the bank had no authority to assign the instruments to the plaintiff; that he was not the holder thereof, or the real party in interest; that at the time of their execution and assignment the plaintiff was assistant cashier of the bank and knew of all the matters herein set forth.

In the fourth part of the answer, the only other part material to the questions here presented, the defendant alleged:

1. That he admits he has and claims an interest in the premises described in the complaint, and in this behalf alleges that his interest is not subject to any lien of said mortgage, or to any interest of plaintiff whatever in said premises; and on the contrary, is superior to and defeats all other interest or claim on the part of the plaintiff to such premises, and that defendant is entitled to said note and mortgage and all beneficial interest therein, and all interest, estate and title acquired by foreclosure of the mortgage, as is more fully hereinafter set forth; that on the 17th day of

February, 1886, a certain contract in writing was entered into by and between the said bank as party of the first part and this defendant as party of the second part, a copy of which is hereto attached and made a part hereof; that in pursuance of such contract, at the time of signing the same, the defendant did pay to the party of the first part the sum of \$2,000 as therein stipulated, and then and there executed and delivered to the said party four certain promissory notes in the several sums, and becoming due according to the terms of said contract; that the sum of \$2,000, due on March 3, 1886, the defendant, at the time it became due, tendered and offered to pay to said bank, and it refused such tender, and was not able to produce the notes given therefor by reason of an attachment or some disposal thereof, and defendant has at all times since been ready and willing to pay the same; that this defendant has since been compelled to pay, and has paid, for the benefit of said bank, the several sums of the other three notes above mentioned, as the same became due to the holders thereof, having been indorsed and transferred to third parties by said bank, in the aggregate amount of \$5,000 or more; that in addition to the sums aforesaid, defendant, at the request of said first party, and the receiver in charge of said bank, and for its benefit under said contract, has paid and procured to be paid, in discharging said brewing company and its property from the debts and incumbrances which said bank assumed and undertook to pay, in order to give good title to all said property under said contract, and which it was unable and failed to pay or discharge, a large sum of money, in the aggregate, to-wit: \$7,500; that the defendant has performed and tendered performance, and at all times has been ready and willing to perform all the agreements and obligations agreed to be kept and performed on his part according to the tenor and effect of said contract; but on the contrary, the said bank has at all times failed and refused and has become insolvent and unable to perform the same on its part, except to the extent of transferring to defendant at the time, one hundred and fifty-four shares of capital stock of said brewing company.

Defendant asked judgment that his interest in the premises be declared superior to that of the plaintiff; that he be entitled to all beneficial interest in said mortgage; that the bank by its re-

ceiver be required to specifically perform said contract, or account to defendant for all moneys received thereunder, and that the same be applied as a set-off or counter-claim in reduction of the mortgage debt; that the plaintiff's action be dismissed and that he have such other or further relief as would be just and equitable.

Copy of the contract: This contract made and entered into this 17th day of February, 1886, by and between the First National Bank of Sioux Falls, Dakota Territory, party of the first part, and Moriz Levinger, of the city aforesaid, party of the second part, witnesseth:

The party of the first part, in consideration of the promises and agreement hereinafter entered into on the part of the party of the second part hereby sells and transfers to the said party of the second part all the personal property, books and accounts, and all property outside the city of Sioux Falls, now belonging to the Sioux Falls Brewing Company, a corporation existing and doing business under and by virtue of the law of Dakota Territory, at Sioux Falls, aforesaid; provided, and it is hereby expressly agreed by and between the parties hereto that time is the essence of this contract and that the title to the aforesaid property shall not pass absolutely until full payment for the same, and in case the party of the second part shall fail to make any of the payments hereinafter set forth to be made by said party of the second part within thirty days of the time stipulated and agreed upon, then the sale aforesaid shall be null and void and of no effect and the payment then made by the party of the second part shall be treated as liquidated damages for the non-fulfillment of the contract on the part of the party of the second part.

And the party of the second part, in consideration of the sale and transfer of the property as above set forth by said party of the first part, hereby agrees to pay said party of the first part, as follows: At the time of signing this agreement, \$2,000; March 3, 1886, \$2,000; April 3, 1886, \$1,000; June 3, 1886, \$1,500; July 3, 1886, \$2,500.

It is hereby expressly agreed by the parties hereto that upon the execution of this agreement and the payment of \$2,000 as hereinbefore set forth the said party of the first part will assign, transfer, or cause to be assigned, transferred and set over to the said party



of the second part by good, valid and legal assignment three hundred and twenty-five shares of the capital stock of the Sioux Falls Brewing Company.

And the party of the second part hereby agrees to purchase all of the real estate, and does hereby purchase all of said real estate and all appurtenances thereto now belonging to the Sioux Falls Brewing Company aforesaid, and hereby promises and agrees to pay said party of the first part the sum of \$20,000 within eighteen months from this date.

And the party of the first part hereby covenants, promises and agrees that they will, and do hereby sell to the said party of the second part all the real estate and the appurtenances thereto belonging, that is now owned by said Sioux Falls Brewing Company for the sum of \$20,000 ; and covenants, promises and agrees that it will, at any time after the foreclosure, and within eighteen months from the date of this agreement upon demand of the party of the second part, make, execute and deliver to the said party of the second part, a good and valid assignment of all its indebtedness and evidences of indebtedness which the said party of the first part had against the Sioux Falls Brewing Company aforesaid on the 18th day of February, 1886, or now has at the time of the execution of this agreement, or may accrue to the said party of the first part, or come into the possession of the said party of the first part, resulting from the now existing indebtedness from the Sioux Falls Brewing Company aforesaid to the party of the first part ; meaning hereby to sell and assign all the indebtedness of the Sioux Falls Brewing Company to said party of the second part, and also meaning to hereby agree to assign the same, and the evidences thereof to the said party of the second part, his heirs and assigns at any time within eighteen months from this date upon demand, and the payment of \$20,000 to the said party of the first part by said party of the second part.

And the said party of the first part as part consideration of the covenants, agreements, and promises, made and entered into herein by and on behalf of the party of the second part, hereby promises and agrees that it will, as soon as mature, proceed to foreclose (without expense to the said party of the second part) that valid and subsisting mortgage of \$20,000 to W. F. Furbeck, now speci-



fied, and also all mortgages it now holds against the Sioux Falls Brewing Company, and prosecute said foreclosure to a speedy conclusion, and upon demand of the said party of the second part, at any time after the foreclosure of, and within eighteen months from this date, and the payment to the said party of the first part the sum of \$20,000, hereby covenants, promises and agrees, that it will cause to be executed and delivered to the said party of the second part, his heirs and assigns a good and valid sheriff's deed of all the real estate and the appurtenances thereto belonging as above described; and also covenants and agrees that it will, in addition to the promises and agreements above set forth, to be done and performed by said party of the first part, make, execute and deliver to said party of the second part a good and valid quit-claim deed, to the aforesaid premises upon demand, provided the said party of the second part has paid said sum of \$20,000 as aforesaid, or will pay the same upon the execution and delivery of said deed.

And the said party of the first part hereby promises and agrees to save said party of the second part, his heirs or assigns from all costs and expense of every name and nature owing to any indebtedness that may exist at the present time on the part of the Sioux Falls Brewing Company aforesaid to any person or persons, firm, company, or corporation whatever.

In witness whereof, the said party of the first part, and the said party of the second part have hereunto subscribed their names and affixed their seals in duplicate the day and year first above written. The First National Bank, by R. J. Wells, President; W. F. Furbeck, Cashier; Moriz Levinger.

Upon this contract the defendant Levinger also interposed a cross-complaint against the bank, its receiver, the brewing company and the plaintiff, asking substantially the same relief as in the answer. The only additional facts disclosed by the cross-complaint were, that the bank at the execution of the contract was the holder of three hundred and twenty-five shares of the four hundred shares of the capital stock of the brewing company; that the defendant was a stockholder in the bank; that the \$20,000 mortgage referred to in the contract is the one sought to be foreclosed in this action, and that the bank by Furbeck, its cashier, and the payee of the mortgage, executed to the defendant

on the 17th day of February, 1886, a title bond for the conveyance of the real estate of the brewing company.

The receiver demurred to the cross-complaint on the ground it did not state facts sufficient to constitute a cause of action against him.

The plaintiff demurred to the fourth part of the answer on the ground that it did not state facts sufficient to constitute a defense or counter-claim, and to the cross-complaint on the ground that it did not state facts sufficient to constitute a cross-complaint against him. These demurrers were sustained and the defendant appealed.

*Bailey & Davis* and *H. H. Keith*, for appellant.

The respondents are not in a position to question the validity of the contract.

Its illegality is based on the claim that it would prevent rivalry at foreclosure sales. This would be a forced construction. It should be construed so as to uphold rather than destroy it. 2 Pars. Cont. 503; Bish. Cont., §§ 380, 383, 391, 397; C. C., §§ 938, 939; *Marie v. Garrison*, 83 N. Y. 14; *Whitmore v. Porter*, 92 id. 77; *Greenh. Pub. Pol.* 27.

The contract was divisible, and there being no possible taint as to the part relating to the personalty it ought to have been upheld. Bish. Cont. 487; 2 Pars. 505.

It was not a fraud upon the stockholders or creditors, nor would it have had the effect to dissolve the corporation.

Even if the contract were void the bank could not retain the money it had received under it without liability to account to the defendant. *McBlair v. Gibbs*, 17 How. 237; *Brooks v. Martin*, 2 Wall. 70; *Wann v. Kelley*, 5 Fed. Rep. 584; *Cook v. Sherman*, 20 id. 167; *Tenant v. Elliot*, 1 B. B. P. 3. Under these authorities the defendant could have maintained an action against the bank for the money it had received, and he being interested in the brewery, as shown by the contract and title bond, has the right to use it in reduction of the mortgage debt.

*Coughran & McMartin* and *Gamble Bros.*, for Thompson, receiver.

1. The contract under which Levinger claims is void on the

grounds of public policy, for the reason that its natural tendency is to restrict and diminish competition at a public sale. *Greenh. Pub. Pol.* 178, 183, 184, 185, 189; *Wight v. Rindskopf*, 43 *Wis.* 348; *Gardner v. Morse*, 25 *Me.* 140; *Morrow v. Darling*, 47 *Vt.* 67; *Brisbane v. Adams*, 3 *N. Y.* 129; *Vantress v. Hyatt*, 5 *Ind.* 487; *Bants v. Cole*, 7 *Black*, 265; *Cocks v. Izard*, 7 *Wall.* 559; *Slater v. Maxwell*, 6 *id.* 268; *Gibbs v. Smith*, 115 *Mass.* 592; *Gardner v. Morse*, 25 *Me.* 140; *Durfree v. Moran*, 57 *Mo.* 374; *Webster v. French*, 11 *Ill.* 254; *Morris v. Woodward*, 25 *N. J. Eq.* 32; *Hawley v. Cramer*, 4 *Cow.* 717; *Jackson v. Ludeling*, 16 *How.* 616; *Jones v. Caswell*, 3 *Johns. Cas.* 29; *Thompson v. Davis*, 13 *Johns.* 112; *Doolin v. Ward*, 6 *id.* 194; *Brackett v. Wyman*, 48 *N. Y.* 667; *Wilber v. Howe*, 8 *Johns.* 444; *Perkins v. Savage*, 15 *Wend.* 412; *Packard v. Bird*, 40 *Cal.* 383; *Atcheson v. Mallon*, 43 *N. Y.* 147; *Munson v. Syracuse, G. & C. R. W. Co.*, 29 *Hun*, 76; *Howell v. Mills*, 53 *N. Y.* 322; *Bliss v. Matteson*, 45 *id.* 22.

2. It shows a conspiracy to defraud the brewing company and the stockholders from its right to have a free unrestricted competition of a sale of its property under the mortgage if any should be necessary.

3. It shows a conspiracy to defraud stockholders not in any manner interested with the bank, and thereby the deprivation of the property rights of others. *Smith v. Harrison*, 27 *L. T. (N. S.)* 188, 20 *W. R.* 594; *Greenh.* 209; *Guernsey v. Cook*, 120 *Mass.* 501; *Western U. T. Co. v. Union P. R. R. Co.*, 1 *McCrary*, 418; *Fuller v. Dame*, 18 *Pick.* 422; *Case v. Gerrish*, 15 *id.* 49; *Cook v. Sherman*, 4 *McCrary*, 20.

4. It shows a conspiracy to create a default in a valid and subsisting mortgage not then defaulted, and controlling the action of the brewing company.

5. It is a contract by which a part of the shareholders are to be deprived of their rights in common with other shareholders in the property and franchise of the corporation.

6. It is a contract which is intended to operate as a clog upon the equity of redemption of a mortgage by a conspiracy to prevent redemptions foreign to and unknown to the original mortgage contract. *Greenh.* 198; *Story Eq. Pl.* 389.

7. It is a contract for disposing of property belonging to a stranger to the contract.

8. The contract calls for a disposition of property by the law contrary to its express demands.

9. The pleading is contradictory, inartificial and unknown to our practice.

10. The contract is entire and impossible of performance. *Stevens v. Coon*, 1 Pinn. 356.

11. One of the parties to the contract is a national bank, and is not authorized to deal in property or to acquire it in the manner specified, and cannot deal with the property of third parties as the contract requires.

12. It provides that the bank, the holder (not owner) of a large majority (more than three-fourths) of the stock, shall immediately put the other party to the contract in the same position without consideration except the sale of the property of the brewing company to him without pretense of any interest whatever in the property except the mortgage.

13. It is a contract to avoid one or the other of antagonistic legal obligations.

The defendant is entitled to no relief. The contract being void no subsequent acts of the parties under it would have the effect of ratifying or confirming it, or estopping either party from asserting its invalidity. *Wheeler v. Wheeler*, 5 Lans. 355.

The law will neither aid in enforcing it nor in restoring what has been lost under it. *Greenh.* 6, 7, 8; *Cook v. Sherman*, 4 *McCrary*, 20; *W. U. T. Co. v. U. P. R. R. Co.*, 1 *id.* 418; *Snyder v. Welby*, 33 *Mich.* 483; *Sharp v. Wright*, 36 *Barb.* 236; *Perkins v. Savage*, 15 *Wend.* 412; *Oscanyan v. Arms Co.*, 103 *U. S.* 261; *Marshall v. R. R. Co.*, 17 *How.* 317; *Wight v. Rindskop*, 43 *Wis.* 348; *Evans v. City*, 24 *N. J. L.* 771; *Crawford v. Wick*, 18 *Ohio St.* 206.

The contract is not divisible, one consideration runs through the whole; it is a contract for all of the property. *Morris v. Harris*, 15 *Cal.* 257. Suppose an attempt be made to divide it where suggested, the first would be void for the want of a sale, the second would be void because of illegality. *C. C.*, § 904. Defendant could maintain no action for the money paid without

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the aid of the illegal contract, he is, therefore, not entitled to recoup the payments made. *Higgins v. McCrea*, 116 U. S. 671; *Armstrong v. Toler*, 11 Wheat. 258; *Brown v. Tarkington*, 3 Wall. 377; *Davidson v. Lander*, 4 id. 447; *Hanauer v. Doane*, 12 id. 342; *Hall v. Coppel*, 7 id. 542.

If the defendant has any claim against the bank he can only pursue the method pointed out by the national bank act. R. S., § 5235; *Kennedy v. Gibson*, 8 Wall. 498; *Bank v. Bank*, 14 id. 383; *Western U. R. R. Co. v. U. S.*, 101 U. S. 543; *White v. Knox*, 111 id. 784.

In any event he has no claim he can use by way of recoupment or set-off as against the bank. He shows no connection with the brewing company. There is no mutuality between him and the plaintiff. *Scammon v. Kimball*, 92 U. S. 36; *Libby v. Hopkins*, 104 id. 303; *Cook C. N. B. v. U. S.*, 107 id. 445; *Venango N. B. v. Taylor*, 56 Pa. St. 14; *Balch v. Wilson*, 25 Minn. 299.

*Boyce & Boyce*, for respondent Peck.

By the COURT:

The contract relied upon by the defense was against public policy, and will not be enforced by specific performance nor allowed to be declared upon by way of recoupment.

Nor is the contract sufficiently definite and specific, in terms, to be enforced, and the judgment must be affirmed. All the justices concur.

REPORTER: — At the May Term, 1888, a rehearing was granted as to the right of the appellant to recover the money paid under the contract set up in the cross-complaint. After the rehearing the following conclusion was announced at that term:

By the COURT:

This case is affirmed, the court being of opinion that the contract set out in the pleadings is contrary to public policy and one which a court of equity will not lend its aid to enforce by specific performance; nor will it permit the defendant in such case, and under this form of action, in which he alleges the validity of, and relies for recovery upon, the contract itself, to recoup the consideration paid in part performance thereof. All the justices concur.

**LANDER, Respondent, v. PROPPER, Appellant.****1. Evidence — Documents — Chattel Mortgage — Proof of Execution.**

Section 493, C. C. Pro., provides: "Every instrument in writing, which is acknowledged or proved, and duly recorded, is admissible as evidence without further proof." Section 1749, C. C. provides: "A mortgage of personal property must be signed by the mortgagor in the presence of two persons, who must sign the same as witnesses thereto, and no further proof or acknowledgment is required to admit it to be filed." The court, without proof of execution, allowed the plaintiff to put in evidence a chattel mortgage that had been filed for record. The complaint, which was for the conversion of the property mortgaged, alleged its execution; the answer denied all of the allegations of the complaint but contained a statement that the only claim of the plaintiff to the property was under a written instrument, in form a chattel mortgage, and that it, at the time of its execution, was fraudulent and void. *Held*, that if proof of execution was not dispensed with by § 493, its execution was admitted by the answer and there was no error in allowing it to be read in evidence.

**2. Damages — Measure, on Conversion of Mortgaged Property.**

Where a mortgagee had taken possession of the chattels under the conditions of the mortgage and had necessarily incurred expenses in keeping them until they were taken by the defendant on an attachment against the mortgagor, it was *held*, in an action of trover, that if the mortgagee was entitled to recover he could recover these expenses in addition to the amount of the debt and interest, where the mortgage provided that he could take possession, hold or dispose of the property, retain the amount of the debt, interest "and such other expense as may have been incurred."

(Argued and determined at the February Term, 1888.)

**A** PPEAL from the district court, Richland county; Hon. W. B. McCONNELL, Judge.

This was an action by N. S. Lander, plaintiff, against M. B. Propper, defendant, for the conversion of a stock of goods. The plaintiff recovered judgment and the defendant appealed.

The plaintiff claimed to be entitled to recover under a chattel mortgage on the property. The defendant, the sheriff, took it on an attachment against the mortgagor, on the ground that the mortgage was fraudulent as against the attaching plaintiff, a creditor.

The plaintiff in his complaint, among other things alleged the execution of the mortgage to him by A. E. Weber & Co. The

defendant denied all of the allegations of the complaint except such as were admitted, qualified or explained, but as to the execution of the mortgage he stated: For a further answer defendant alleges on information and belief that the sole pretended title to, or right of possession of the plaintiff to any of the property described in the complaint was, and is derived under and by virtue of a certain written instrument bearing date about April 28, 1883, in form a chattel mortgage, signed by A. E. Weber & Co., purporting to convey and mortgage all of the goods in the store now occupied by A. E. Weber & Co., which pretended chattel mortgage was filed in the office of the register of deeds of Richland county, April 30, 1883; that said instrument was, at the time of the execution thereof, and ever since has been fraudulent and void, and that no title by virtue of it was ever conveyed to, or vested in, said plaintiff.

At the trial the plaintiff called the register of deeds, proved that the mortgage was one of the files of his office, and then offered it in evidence. The defendant objected to its introduction on the ground it had not been sufficiently proved. The objection was overruled and an exception taken. The chattel mortgage on its face appeared to have been signed in the presence of two witnesses, and there was an indorsement of filing on it by the register. The section of the C. C. with reference to the filing of chattel mortgages and the section of the C. C. Pro., as to the admissibility of instruments are stated in the first head-note.

The condition of the mortgage on the question of expenses is stated in the second head-note. The plaintiff proved that he had been in possession of the property under the mortgage about two months before it was taken from him by the defendant. He then offered to show that he had hired men and paid them for holding the property during this period. The defendant objected to this on the ground that it was immaterial, and because the mortgage did not provide for any expenses, excepting foreclosure sale. The court overruled the objection and permitted the fact of hiring to be shown, and the amount that had been paid for the service. The court also instructed the jury that if they found for the plaintiff he was entitled to recover the amount of the mortgage debt and interest thereon, with such expenses as were



necessarily incurred by him in holding possession of the property under the mortgage. The defendant excepted to the instruction and the ruling of the court on the admissibility of the evidence.

*Stone & Newman*, for appellant.

To have entitled the alleged chattel mortgage to be introduced in evidence against the defendant, who represented the creditors of the mortgagor, it was necessary to show that it was "signed by the mortgagor in the presence of two persons who signed the same as witnesses thereto." C. C., §§ 1749, 1750, 1744, 1745; *Galpin v. Abbott*, 6 Mich. 17; *Graves v. Graves*, 6 Gray, 391; *Zeigler v. Shomo*, 78 Pa. St. 357; *Pringle v. Dunn*, 37 Wis. 449; *Parrott v. Shaubhut*, 5 Minn. 323; *Williard v. Cramer*, 36 Ia. 22; *Clarke v. Graham*, 6 Wheat. 577; § 493, C. C. Pro.

Plaintiff was not, in any event, entitled to recover for expenses paid in holding the property. C. C., § 1710; *Keith v. Haggart* (Dak.), 33 N. W. Rep. 465.

The "expenses" provided for in the mortgage not being definite, the mortgagee is confined to such only as he could legally incur.

*M. W. Greene*, for respondent.

Section 493, C. C. Pro., provides that every instrument acknowledged or proved, and recorded, is admissible without further proof. This section is applicable to chattel mortgages, for such an instrument duly filed is as much a record as if it had been transcribed on the books of the county. Section 1749, C. C., declares that if the mortgage is duly witnessed, "no further proof" is required to entitle it to be filed, and section 493 refers to instruments acknowledged, "or proved." The mortgage, therefore, or a certified copy, was admissible without proof of execution. 1 Whart. Ev., § 740; *Houghton v. Jones*, 1 Wall. 702; *Younge v. Gilbeau*, 3 id. 636; *Sannels v. Barrowscale*, 104 Mass. 207; *Clark v. Troy*, 20 Cal. 219.

The answer, however, raises no issue upon the execution of the mortgage, that is admitted.

The instructions on the measure of damages in view of the provisions of the mortgage were correct. This was a lawful subject of contract.



• The COURT :

The chattel mortgage was admissible, if not as a record, its execution was admitted by the answer.

The court did not err in the measure of damages. The judgment is affirmed. All concur.

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LYON, Respondent, v. INSURANCE COMPANY OF DAKOTA, Appellant.

**Insurance — Incumbrances — Waiver — Agent — Authority.**

On an issue of the agency and authority of a certain insurance firm to waive, by its knowledge of the facts, the condition of a policy requiring all incumbrances to be stated in the written application, it appeared the firm received the application and the premium for the insurance; that they were transmitted to the company by the firm through one P.; that the company sent the policy direct to P., that it was thereafter delivered to the assured, by said firm; that the company had never had any dealings with the firm, or knew of its existence until the time of the trial and knew nothing of the incumbrances until after the loss. *Held*, the firm was such an agent of the company as would enable it to waive the requirement of the condition.

(Argued and determined at the February Term, 1888.)

**A** PPEAL from the district court, Minnehaha county; Hon. JAS. SPENCER, Judge.

This was an action on a policy of insurance for a loss sustained by fire. The action was by an assignee, the assignment having been made after the loss. The plaintiff recovered judgment and the defendant appealed. The defendant claimed the policy had been avoided; in fact, that it was never in force from the assured's omission to comply with its conditions requiring him to inform the company of incumbrances on the property. The condition was as follows: "If the property hereby insured, either real or personal, or any part thereof, be or shall become incumbered by mortgage, judgment, or otherwise, and it be not so stated in the written application or indorsed in writing on the policy, this policy and every part thereof shall be void."

The plaintiff contended this condition had been waived. The proof on this issue was undisputed, and was that the assured, M. M. Porter, owned a hotel, the property insured, at Crescent City,

Florida, and it was destroyed by fire in 1886, during the existence of the policy ; that at the time of the application for the insurance, and at the time of the loss, there were several mortgages on the property ; that a firm of insurance agents there by the name of Webb & Nichols attended to insuring the hotel for Porter, placing it in such companies as they deemed proper ; that before the insuring they examined the property, knew of the mortgages and every thing connected with the place as well as Porter himself ; that he paid the premium to these agents and received the policy from them ; that by a statute of Florida, passed February 27, 1872, a person receiving money on account of an insurance contract was declared to be the agent of the company ; that the policy was issued from the home office, at Sioux Falls, Dak. ; that the application for the insurance and the premium were received by the company from one W. L. Parker, secretary of the People's Insurance Company, Memphis, Tennessee, and defendant sent the policy directly to him ; that it had never done any business with Webb & Nichols, and never heard of them until the trial ; that it never had any notice of the incumbrances on the property before the loss ; that there was no statement of the existence of the mortgages in the application, but it showed the property was located in Florida ; showed that on the filing page of the policy, in prominent type, was the following : " Notice to Policy-holders. No agent has authority to waive any of the conditions of this policy, or the application upon which it is based."

At the close of the evidence the defendant moved the court to direct a verdict in its favor. The court declined to do this, and submitted to the jury as a question of fact, whether Webb & Nichols were the agents of the company or not, and directed them that if they found they were, then their verdict should be for the plaintiff. The jury found for the plaintiff. The defendant moved for a new trial on the grounds of the insufficiency of the evidence to justify the verdict, and because of the refusal of the court to direct the verdict. This motion having been denied and a judgment entered, the defendant brought the case here, assigning error on the action of the court on this motion.

*Bailey & Davis*, for appellant.

The incumbrances were not disclosed in the application ; this

was an express warranty. §§ 1534, 1538, 1539, 1540, C. C.; May, Ins., § 156. Knowledge of the incumbrances by the agents was immaterial, as they were not disclosed in the manner required by the warranty. § 1509, C. C. And the agents had no authority under the terms of the policy to waive any of its conditions. May, § 126; Clevenger v. Mutual Ins. Co., 2 Dak. 114; Chase v. Hamilton Ins. Co., 20 N. Y. 52; Marvin v. Universal Life Ins. Co., 85 id. 287; Green v. Lycoming F. I. Co., 91 Pa. St. 387.

Webb & Nichols were in no sense the agents of the defendant. They were assured's, to do this business *for him*. McFarland v. Peabody Ins. Co., 6 W. Va. 425. They could not be the agents of both parties. §§ 1342, 1361, C. C.; Story, Agency, § 31; 2 Kent (10th ed.), 855; Farnsworth v. Hemmer, 1 Allen, 494. The company never having had any information of them or their acts, there could have been no authority by ratification. Parker could not have been more than a special agent. § 1380, C. C.

If it were possible to hold them agents from their receipt of the premium and delivery of the policy without the knowledge of the company, they would have no general powers so that they could waive the conditions of the policy. Critchett v. Am. Ins. Co. (Ia.), 5 N. W. Rep. 543, 548.

The Florida statute has no application. The contract was made, and it is sought to be in force here.

*Coughran & McMartin*, for respondent.

Knowledge of the agent is knowledge of the company, and his, or its neglect, in making the proper indorsement is a waiver. May, 294; Ætna Ins. Co. v. Olmstead, 21 Mich. 246; Peoria M. & F. Ins. Co. v. Hall, 12 id. 202; Lycoming Ins. Co. v. Jackson, 83 Ill. 302; Smith v. Com. Ins. Co., 49 Wis. 326.

Webb & Nichols were the agents of the defendant. A party accepting money and delivering a policy acts for the company. May, § 140; Union Ins. Co. v. Wilkinson, 13 Wall. 222; Southern L. Rep., Nov. 5, 1880, p. 663; Ins. Co. v. Williams, 39 Ohio St. 588; Schomer v. Heckla Ins. Co., 50 Wis. 575; Alken v. N. H. Ins. Co., 53 id. 156. See, also, Com. Ins. Co. v. Ives, 56 Ill. 402; Union Ins. Co. v. Chip, 93 id. 97; Newark F. Ins. Co. v. Sammons, 110 id. 167.

By the COURT :

The judgment of the lower court is affirmed upon the ground that Webb & Nichols were such agents of the defendant as to have the power to waive the matter of incumbrances, which were known to them at the time of negotiating and accepting the risk for the company, irrespective of the Florida statute offered in evidence. All of the justices concur.

REPORTER: — A petition for a rehearing was denied at the May Term, 1888.

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JUDSON, Respondent, v. BULEN, Appellant.

**Appeal — Justices Peace — Dismissal — Bond — Justification, Sureties.**

Under section 93, Justices' Code, providing, " An appeal from a justice's court is not effectual for any purpose, unless an undertaking be filed with two or more sureties. \* \* \* The adverse party may except to the sufficiency of the sureties \* \* \* and unless they or other sureties justify, \* \* \* upon notice to the adverse party, \* \* \* the appeal must be regarded as if no such undertaking had been given," the respondent excepted to the sureties and they justified on an oral notice to one of respondent's attorneys. No appearance was made by respondent at the justification, and in the district court he moved to dismiss the appeal on the ground that the sureties had not justified in the " manner and form as required by law." At the hearing of the motion appellant offered to have the sureties justify if it was claimed the undertaking was not sufficient security. The court dismissed the appeal. *Held*, the court had acquired jurisdiction of the case and it was error to dismiss the appeal.

(Submitted and determined at the May Term, 1888.)

**A** PPEAL from the district court, Kingsbury county; Hon. L. K. CHURCH, Judge.

The facts and the section of the Justices' Code applicable thereto are stated in the head-note.

*John A. Owen*, for appellant.

The notice of justification was sufficient. Section 93 does not require that it should be in writing. Motions to dismiss are not regarded with favor. 11 Pac. Rep. 97. If there were any defect, appellant should have been permitted to have the sureties justify anew, or others do so. *Dresser v. Brooks*, 5 How. Pr. 75;

Wait Code, § 341, n. *e*, *f*, and § 334, n. *h*; Hees v. Snell, 8 How. Pr. 185; Mills v. Tursby, 11 id. 129; People v. Tarbell, 17 id. 120.

*Watson & Hall*, for respondent.

A failure to give the notice of justification required by section 93 rendered the appeal ineffectual for any purpose. Kelsey v. Campbell, 14 Abb. 368; 4 Wait Pr. 237, 274; 38 Barb. 238; Chamberlain v. Dempsey, 22 How. Pr. 356; S. C., 13 Abb. 421.

By the COURT:

The judgment is reversed on the ground that the court erred in dismissing the appeal and in holding it had not acquired jurisdiction. All concur.

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STURR, Appellant, v. BECK, Respondent.

**1. Waters and Water-Courses—Public Lands — Water Rights — Priority.**

The right of a homestead settler to the use of the water flowing over land, is superior to that of one entering upon the land under the United States statutes and customs of miners in the locality, and locating a water right subsequent to the settler's occupancy, but prior to his final proof.

FRANCIS and CARLAND, JJ., dissenting.

**2. Same — Injunction — Estoppel.**

In such case where S., the water-right claimant, sought to restrain B. from diverting the water, it appeared that he, S., in 1880, without a grant, went upon land on which B.'s grantor had settled in 1877, and located a water right according to the recognized custom of the locality where the land was situated, constructed his ditch and had the uninterrupted use of the water for the purpose of irrigation till B. diverted it in 1886; that B.'s grantor in 1879 applied to enter the land as a homestead, made his final proof in 1883, received his patent the same year and conveyed the land to B., with covenants of warranty in 1884. It also appeared that B.'s grantor in 1882 entered into an agreement with S., in reference to the construction of another ditch in which, by way of recital, it was stated S. owned this water right; this agreement was recorded at the time. The patent to B.'s grantor contained the usual condition of being "subject to any vested and accrued water rights." *Held*, that B.'s grantor was the prior appropriator of the water right, and S. had no right of action.

FRANCIS and CARLAND, JJ., dissenting.

(Argued and determined at the May Term, 1888.)

**A**PPEAL from the district court, Lawrence county; Hon. CHAS. M. THOMAS, Judge.

This was an action by Daniel Sturr, plaintiff, against Charles W. Beck, defendant, to restrain him from interfering with a water ditch on his (defendant's) land, used by plaintiff to carry water to his land, and for damages sustained by reason of interference with the ditch and water. The defendant had findings and judgment in his favor, and the plaintiff appealed.

The case was tried on an agreed state of facts which (omitting particular descriptions of property and formal parts of instruments) were as follows:

1. That in June, 1877, the plaintiff settled upon one hundred and sixty acres of land in what is known as Falsebottom, Lawrence county, Dakota, through which Falsebottom creek flowed, and on the 15th of May, 1880, at the proper land office, filed his application to homestead said land; that he proved up, on March 10, 1883, and a United States patent issued to him for the land December 20, 1883; that he resided continuously on the land and cultivated a part thereof since his settlement in 1877.

2. That in March, 1877, one John Smith, the immediate grantor of the defendant Beck, settled upon one hundred and sixty acres of land immediately above the plaintiff's claim and through which the creek flowed; that on the 25th of March, 1879, said Smith filed his application to homestead said land; that on March 10, 1883, he proved up, and a patent was issued to him December 10, 1883; that Smith resided continuously upon the land from his settlement in 1877, until he sold the same to Beck, in May, 1884.

3. That said Smith sold by warranty deed, purporting to convey the fee to said Beck, and delivered to him the patent; that the defendant took possession of the premises and has lived there ever since, cultivating a good part of the same.

4. That on the 15th day of May, 1880, without a grant from said John Smith, the plaintiff located a water right on Smith's homestead claim, lot 2, on Falsebottom creek, posted a written notice there, claiming the right to divert five hundred inches of the water of said creek, miners' measurement, calling the same therein the "Elm Tree" water right, and caused a copy of the same to be filed as a certificate in the office of the register of

deeds of Lawrence county, D. T., May 9, 1881, which was duly recorded in said office, in book 14, p. 468, and is in the words and figures following :

“Know all men by these presents: That I, the undersigned, citizen of the United States and resident of the county of Lawrence and Territory of Dakota, claim, by right of location and appropriation, for mining, milling, agricultural, domestic or any other useful or beneficial purpose, to which the same can be applied, the following described water right, to-wit :

“Five hundred inches, miners’ measurement, of the waters of Falsebottom creek, at a point on lot No. 2, section 2, township 6, range 3.

“I claim the right to divert and convey the said water by ditch, by pipe or flume, to any point where it can be conveniently used for any of the aforesaid purposes. This shall be known as the ‘Elm Tree water right.’ Located May 15, 1880, and ditch constructed and water turned into the same. Date of certificate, May 9, 1881. Daniel Sturr.”

5. That, after locating said water right, plaintiff proceeded with due diligence and constructed a water ditch from the point of location across said lot 2, of Smith’s homestead, in a northerly direction to and upon his own homestead claim, at a cost of about \$500 and appropriated and used the waters of said Falsebottom creek through the same for the purposes of irrigation, to the extent of at least three hundred inches, miners’ measurement, on his own claim, (and that such was beneficial and profitable) each year thereafter, on his growing crops, until the summer of 1886, when the defendant, Beck, obstructed said ditch at a point on said lot 2, stopped the water, and flowed the same over his own fields and irrigated his own crops therewith.

6. That, in the spring of 1886, the defendant, Beck, notified the plaintiff to cease diverting the water of said creek from its usual channel, and forbade him from maintaining his ditch on defendant’s land.

7. That neither John Smith nor the defendant, Beck, made any use of the water of Falsebottom creek upon the homestead of the former prior to the patenting of the same, or since, by means of any diversion or appropriation of the same from its usual chan-



nel, in any ditch or canal, except the use made by Beck from the ditch of plaintiff in 1886-7, as herein stated.

8. That the local customs now existing and which have existed since the early settlement of the country in the locality where the respective homesteads are situated, recognize and acknowledge the right to locate water rights and to appropriate and to use the waters of flowing streams for the purpose of irrigating crops, by means of ditches and canals.

9. That in ordinary seasons and in the locality named, irrigation is necessary for the crops planted and sowed, and without it they are usually failures. That there are in that locality the following named ditches, besides the plaintiff's : [Five are named], all used for the purpose of irrigation.

10. That on the 1st day of February, 1882, the said plaintiff and the said John Smith located a water right higher up Falsebottom creek and called the same, " Willow Grove water right ; " and on the 2d day of February, 1883, said plaintiff and said John Smith entered into a written contract in relation thereto, which contract was in the words and figures following, to-wit :

" This agreement made and entered into this, second day of February, A. D. 1882, between John Smith of Lawrence county, D. T., of the first part, and Daniel Sturr of the same county party of the second part. Witnesseth : That whereas, the parties hereto did on the 1st day of February, A. D. 1882, locate a certain water ditch on Falsebottom creek, in said county and territory, at a point on the ranch of John Deitschi, in said county and filed the same in the office of the register of deeds of said county for record this 2nd day of February, 1882, to which reference is hereby made for more perfect description of the said water right : and whereas, the parties hereto are desirous and intend to build a ditch to carry all the water claimed by said right, viz. : 500 inches, more or less, for irrigating the ranches of the respective parties : Now in consideration of the premises, the parties hereto promise and agree, one with the other, that each will pay half of all the costs and expense in running and making said ditch from said point of commencement to the ranch of John Smith ; emptying the water at the head of and into the



ditch known as and called the 'Elm Tree' water right, owned by Daniel Sturr in said county and territory.

"It is further agreed by and between the parties, that each party shall have the exclusive right to use all the water which may flow through said ditch every other day during all seasons of the year. If either party fails to pay half the cost of making said ditch by the first day of June, 1882, he shall forfeit all right and title to the use of said water until the said delinquent shall pay his full share. It is further mutually agreed by and between the parties that the expenses of keeping said ditch in repair shall be borne equally by the parties. John Smith, Daniel Sturr."

This instrument was witnessed, acknowledged and recorded in the office of the register of deeds Lawrence county, D. T., February 2, 1882.

11. That upon attempting to open up and use said ditch the said John Deitschi applied for and obtained an injunction restraining said locators from using the said ditch or in any way trespassing upon his property in connection therewith, and said injunction is still in force.

12. Smith's patent was in the ordinary form containing the condition: "Subject to any vested and accrued water rights, for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with said water rights, as may be recognized and acknowledged by the local laws, customs and decisions of the courts."

*McLaughlin & Steele*, for appellant.

The appellant claims that under the local customs, laws and decision of the courts in the section where the water right in dispute is situated, the first appropriator of a stream running through the public lands, has the prior right to the use of the same for mining, milling, agricultural and other purposes to the extent of his original appropriation. There is no dispute as to the respondent's rights at common law. His rights here, however, are to be determined under sections 2339 and 2340, R. S. U. S. In this territory there is no common law on the subject of riparian rights. § 6, C. C.

A homestead claimant is not an owner within the meaning of

section 255, C.C. He is a mere occupant and has no title. U. S. v. Cook, 19 Wall. 591; U. S. v. Freyberg, 32 Fed. Rep. 195; U. S. v. Murphy, id. 376; U. S. v. Storrs, 14 id. 824; U. S. v. Lane, 19 id. 910; F. & P. M. R. R. Co. v. Gordon, 41 Miss. 420; People v. Shearer, 30 Cal. 648; Hilton v. Frisbie, 37 id. 491; W. P. R. R. Co. v. Tevis, 41 id. 494; Lowe v. Hutchins, id. 634; Deffebach v. Hawks, 115 U. S. 405. See, also, Smelting Co. v. Kemp, 104 id. 640; Steel v. Smelting Co., 106 id. 450. Smith, therefore, had no vested interest until March, 1883. The claim was public land and could be charged with the servitude of this prior appropriator of the water under the act of congress.

These propositions are well established :

1. The United States is the absolute owner of the public lands.
2. Homestead claims do not limit the riparian rights of the government preceding final proof.

3. Until after final proof and the performance of all required acts, the homesteader has no vested interest in the land and cannot be the riparian owner.

4. Rights to use running water on the public lands in the Pacific states and territories have been, and may be acquired by prior appropriation, and such rights vest in the first appropriator as soon as he is in condition to use the water. Eddy v. Simpson, 3 Cal. 249; Bear River Co. v. N. Y. M. Co., 8 id. 332; McDonald v. Askew, 29 id. 206; Broder v. Natoma W. & M. Co., 50 id. 621; Osgood v. Eldorado W. & M. Co., 50 id. 571; Farley v. Spring V. M. & I. Co., 58 id. 142; Himes v. Johnson, 61 id. 260; Lobdell v. Simson, 2 Nev. 783; Barnes v. Sabrow, 10 id. 217; Col. M. Co. v. Holter, 1 Mon. 296; Thorpe v. Freed, id. 651; Dodge v. Marden, 7 Or. 456; Crane v. Winsor, 2 Utah, 248; Lehi I. Co. v. Moyles (Utah), 9 Pac. Rep. 867; Yunkers v. Nichols, 1 Colo. 552; Larimer County R. Co. v. People, 8 id. 715; Atchison v. Peterson, 20 Wall 507; Tennison v. Kirk, 98 U. S. 458; Broder v. Natoma W. Co., 101 id. 276. The rules of these cases apply to this part of the territory. See, also, Laws 1881, chap. 142.

The doctrine of relation has no application here. Pacific C. M. Co. v. Spargo, 8 Saw. 645; Bagnell v. Broderick, 13 Pet. 450; Carroll v. Safford, 3 How. 441; Shapley v. Cowen, 91 U. S. 337; Smelting Co. v. Kemp, 104 id. 947.

The respondent is estopped by the conduct and record declaration of his grantor to question this water right. *Morgan v. Railroad Co.*, 96 U. S. 720.

*Van Cise & Wilson*, for respondent.

Respondent's claim to the water is by virtue of his grantor's settlement in 1877, homestead entry in 1879, final proof and patent in 1883, purchase in 1884, and the continuous residence and cultivation of the land since the settlement. That of appellant is by virtue of a so-called location of a right on respondent's land in 1880, without a grant from the owner. Appellant does not sue as a riparian proprietor for a misuse, but as an owner of the water with the right to take it for his exclusive use. Clearly, respondent has the better right and is the prior appropriator. C. C., § 255. This section is not in conflict with section 2339, R. S. U. S. Appellant mistakes respondent's appropriation, it was in 1877, not 1883. Appellant should have acquired his right prior to the settlement. *Union M. & M. Co. v. Dangberg*, 2 Saw. 450, id. 176; *Lux v. Higgin*, 4 Pac. Rep. 919; S. C., 10 id. 674; *Weiss v. Oregon I. & S. Co.*, 11 Pac. Rep. 255; *Van Sickle v. Haynes*, 7 Nev. 249; *Crandall v. Woods*, 8 Cal. 136. Respondent had a vested right in the land and to the use of the water more than a year before the alleged location. 1 Copp. P. L. L. 387; *Red. R. & L. W. R. Co. v. Sture*, 20 N. W. Rep. 229, S. C., 32 Minn. 97; *Burlington, K. & S. W. R. Co. v. Johnson*, 16 Pac. Rep. 125; Even in pre-emption cases, when the right vests, it relates back to the settlement for the purpose of cutting off intervening claims. 16 Pac. Rep., *supra*; *Shepley v. Cowan*, 1 Otto, 330.

The use of the water did not ripen into a right. It was an interest in the land and could only be acquired by grant or prescription. C. C., §§ 245, 249; *Washb. Easem.* 18; *De Hera v. U. S.*, 5 Wall. 599; *Veghte v. Raritan*, 4 C. E. Green, 153; *Drake v. Wells*, 11 Allen, 141; *Foot v. N. H. & N. Co.*, 23 Conn. 214.

No estoppel grew out of the unexecuted contract between appellant and Smith. There is a want of all of the elements of an estoppel. *Boggs v. Mercer M. Co.*, 14 Cal. 279; *Philadelphia R. R. Co. v. Howard*, 18 Wall. 255.

By the COURT:

The judgment is affirmed. The court holds that the homesteader was the prior appropriator of the water right, and the plaintiff had no right to enter upon the prior possession of the entryman, under his homestead entry, and appropriate any portion of the running streams or creeks thereon.

All of the justices concur except FRANCIS and CARLAND, JJ., who dissent.

REPORTER: — On appeal to the supreme court of the United States the judgment in this case was affirmed. 133 U. S. 541, 10 Sup. Ct. Rep. 350.

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HENRY, Appellant, v. DEAN, Respondent.

**Appeal — Review — Insufficiency of Evidence — Practice.**

Under § 279, C. C. Pro., requiring a party who objects to a decision on the ground of the insufficiency of the evidence to sustain it, to specify the particulars wherein it is insufficient, and there was nothing in the record pointing out wherein it was claimed the evidence was insufficient, the court cannot examine the evidence.

(Argued and determined at the May Term, 1888.)

**A** PPEAL from the district court, Roberts county; Hon. L. K. CHURCH, Judge.

This was an action to redeem certain premises from a foreclosure sale. The only issue was whether or not the plaintiff had tendered to the defendant the redemption money. This issue was tried by the court without a jury; the court found the tender had not been made, filed findings in accordance therewith, and ordered judgment for the defendant. The plaintiff moved for a new trial on the ground of the "insufficiency of the evidence to justify the decision." The motion was made upon a statement, but it nowhere pointed out, nor did the record show, wherein it was claimed the evidence was insufficient. The motion was denied November, 1886, judgment was afterward entered November, 1887, and the plaintiff appealed, assigning error on the refusal to grant the new trial.

At that time section 279, C. C. Pro., provided: "No particular

form of exception is required. The objection must be stated, with so much of the evidence or other matter, as is necessary to explain it, and no more. But when the exception is to the verdict or decision, upon the grounds of the insufficiency of the evidence to sustain it, the objection must specify the particulars in which such evidence is alleged to be insufficient."

*J. B. Atwater and Babcock & Bacon*, for appellant.

*M. O. Little (Hooker, Little & Munn, counsel)*, for respondent.

The particular error relied upon for the new trial should have been pointed out. *Bush v. Northern P. R. R. Co. (Dak.)*, 22 N. W. Rep. 508, 510.

By the COURT:

The judgment of the court below is affirmed. The court holds there is no sufficient exception apparent of record as would permit this court to examine the evidence to determine whether it is sufficient to justify the findings of the court. All concur.

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RUDOLPH, Appellant, v. NORTH, Respondent.

**Replevin — Pleading — Verdict — Judgment.**

In an action of replevin the plaintiff sought to recover under two chattel mortgages. The defendant, a sheriff with an attachment against the mortgagor, contended one of the mortgages was void, but did not resist recovery as to the other, only to the property or its value in excess of this mortgage. The jury returned a verdict finding the first mortgage "void," and that the plaintiff was entitled to the possession of the property, fixing its value and the plaintiff's damages. The court thereupon entered judgment that the defendant was entitled to the possession of the property or its value, in excess of the uncontested mortgage, together with costs and disbursements. *Held*, error, and, 1. Such a verdict is neither general or special, and an objection to its receipt should have been sustained. 2. That the special finding was not sufficient to sustain the judgment. 3. That in such case it was necessary to order a new trial.

(Argued and determined at the May Term, 1888.)

**A** PPEAL from the district court, Lincoln county; Hon. C. S. PALMER, Judge.

Replevin, M. E. Rudolph, plaintiff, and J. M. North, defendant. The defendant had judgment and the plaintiff appealed.

The plaintiff brought this action to recover the possession of a stock of goods that the defendant had taken on a writ of attachment. Plaintiff based his right to recover upon two chattel mortgages executed by the defendant in the attachment. One of these mortgages, called exhibit "C," was made directly to him, the other he held by assignment. The defendant justified the taking under the attachment on the ground that the mortgage, exhibit "C," was void as against creditors whom he represented in the attachment. He also alleged that he "disclaims the right to the possession of any more of said property, or the value thereof, than may remain after the payment" of the assigned mortgage; but alleged that the mortgagee of the assigned mortgage, prior to its assignment, had recognized his possession of the property under the attachment of which the plaintiff had notice.

At the trial the jury returned the following verdict: "We the jury in the above-entitled action find in favor of the plaintiff and against the defendant, except as to the mortgage marked exhibit 'C,' which we find to be null and void, and that the plaintiff is entitled to the possession of the property described in the complaint, and find the value thereof to be \$2,549.47, and assess the plaintiff's damages sustained by reason of the taking and detention of the said property at \$60. E. W. Owens, Foreman."

The defendant objected to the reception of this verdict. The court, however, received it and discharged the jury. Each party thereafter applied for judgment in his favor on the verdict, and the court entered the following findings and judgment:

1. That the value of the property described in the complaint is \$2,549.47.

2. That of said amount of property the plaintiff had an interest amounting to \$557.12, which in no way conflicted with the defendant's right of possession, and was duly disclaimed by the defendant in his answer herein, and that said amount of \$557.12 was all the interest plaintiff had in said property.

3. That the chattel mortgage described in the complaint as exhibit "C" is fraudulent and void as to the creditors of the mortgagor.

4. That the defendant is entitled to the possession of the prop-

erty described in the complaint, or if a return thereof cannot be had, then the value of his interest therein, to-wit: \$1,992.35.

5. That the defendant also have and recover of the plaintiff his costs and disbursements in this action, amounting to \$37, making in all the value of the defendant's interest in the property, \$2,029.35.

The plaintiff appealed, assigning error upon the rendition of this judgment.

*H. H. Keith* and *M. E. Rudolph*, for appellant.

The question of a lien on the surplus after satisfying a mortgage cannot be tried in a replevin suit. *Gillespie v. Brown*, 20 N. W. Rep. 632; *Blue Valley Bank v. Clement*, 30 id. 66; §§ 263, 295, C. C. Pro.

The judgment is void. There can never be a judgment for each in replevin where the property is indivisible. *Phipps v. Taylor*, 16 Pac. Rep. 173; *Blue Valley Bank v. Clement*, *supra*; *Pratt v. Tucker*, 67 Ill. 346; *Poor v. Woodburn*, 25 Vt. 234; *Powell v. Hinsdale*, 5 Mass. 324; *Guille v. Wong Fook*, 11 Pac. Rep. 277; *Ela v. Bankes*, 37 Wis. 89.

The verdict was general. § 260, C. C. Pro.; *Brewster v. Bowers*, 8 Cal. 501; *Board v. Parker*, 7 Minn. 267. Finding one of the mortgages void was not a special finding; it was a conclusion of law. *Louisville & N. R. R. Co. v. Worley*, 7 N. E. Rep. 215; *Pittsburg v. Adams*, 5 id. 187; *Louisville & N. R. R. Co. v. Batch*, 4 id. 288; *Hidden v. Jordan*, 28 Cal. 305, id. 244, 588; *Keller v. Bootman*, 49 Ind. 108; *Edgell v. Hart*, 9 N. Y. 213; *Dalton v. Rentaria*, 15 Pac. Rep. 37. It was surplusage and would not affect plaintiff's general verdict. *Proff. Jury*, §§ 413, 432, 445; *Coit v. Waples*, 1 Minn. 134; *Pierce v. Shaden*, 62 Cal. 283; *O'Brien v. Palmer*, 49 Ill. 74; *Louisville & N. R. R. Co. v. Flannagan*, 14 N. E. Rep. 370; *Walson v. R. R. Co.*, 50 Cal. 524; *Chamberlain v. Vance*, 51 id. 85; *Marquad v. Wheeler*, 52 id. 445.

If a verdict be repugnant the court ought to set it aside, not substitute its judgment for that of the jury. *Hewson v. Saffin*, 7 Ham. (Ohio) 232; *Barrett v. Hall*, 1 Mass. 497.

The verdict did not support the judgment rendered. This is



necessary. *Garlick v. Bower*, 62 Cal. 65; *Cummings v. Peters*, 56 id. 597; *Thomas v. Lawler*, 53 id. 407; *Kiel v. Reay*, 60 id. 62; *Ross v. Anstell*, 2 id. 192; *Child v. Child*, 13 Wis. 17.

For the defendant to have had this judgment, his interest and its value ought to have been found by the jury. *Woodruff v. King*, 2 N. W. Rep. 452; *Williams v. Brosnahan*, 33 id. 739; *Strahan v. Smith*, 16 Pac. Rep. 747; *Welton v. Baltezore*, 23 N. W. Rep. 1.

The verdict was sufficient to warrant a judgment for the plaintiff. In such a case the court will reverse and order the proper judgment, not a new trial. *Everit v. Walworth*, 13 Wis. 419; *Rankin v. Greer*, 16 Pac. Rep. 680. See, also, *Proff. Jury*, § 418; *Newlin v. Reed*, 30 Ia. 496; *Moore v. Devol*, 14 id. 112; *Eisley v. Mulchow*, 2 N. W. Rep. 372; *Fitzer v. McCannon*, 14 Wis. 63; *Krause v. Cutting*, 28 id. 655; *Eldred v. Oconto County*, 33 id. 137; *Clark v. Heck*, 17 Ind. 281.

*F. R. Aikens* (*A. R. Brown*, counsel), for respondent.

The only issues were the validity of the mortgage, exhibit "C," and the value of the property. These issues having been found for the defendant he was entitled to judgment.

It is evident the jury agreed with the defendant on the only real question in the case, and should the court reverse the judgment, it ought to grant a new trial. Great injustice would be done without it. *Johnson v. U. P. B., etc.*, 5 Cent. Rep. 750.

By the COURT:

The judgment is reversed upon the ground that the verdict is neither general nor special. It should have been rejected by the court, and the jury again sent out to deliberate. The objection of respondent to its reception should have been sustained.

The special finding in the verdict in favor of the respondent was not sufficient in law to sustain the judgment.

That an inspection of the record shows a mis-trial of the cause, and a new trial is ordered. All of the justices concur.

REPORTER:—The appellant petitioned for a rehearing as to so much of the decision as directed a new trial. The petition was denied at the October Term, 1888.



WARDER ET AL., Appellants, v. PATTERSON, Respondent.

**Judgment — Default — Vacating — Practice — Order — Validity.**

Under § 143, C. C. Pro., authorizing the court, in its discretion, and upon such terms as may be just, to allow an answer to be made after the time limited by law, "or by order enlarge such time," a judge, after the time to answer had expired, granted a defendant an order for further time to answer upon an *ex parte* application. The plaintiffs were not served with the order, but were informed of it. The judge of the district being absent from the territory, the plaintiffs (under a statute authorizing another judge to act in such case) applied to, and obtained a judgment by default from another judge during the existence, and while they were aware of the extension order. The defendant thereafter, and within the time granted, served his answer, and then moved to vacate the default judgment. This the court, by the judge who gave the time, granted without terms under the same section which provides that the court "may also, in its discretion, and upon such terms as may be just, \* \* \* relieve a party from a judgment, \* \* \* taken against him through his mistake, inadvertence, surprise or excusable neglect." *Held*, the judgment was properly vacated, and that while the order granting further time was irregular, the plaintiffs were bound by it, and not in a position to complain of a want of terms.

(Argued and determined at the May Term, 1888.)

**A** PPEAL from the district court, Lake county; Hon. C. S. PALMER, Judge.

This is an appeal from an order vacating a judgment by default. The action was commenced the 28th day of January, 1887; the defendant appeared and demanded a copy of the complaint the 2d of February; the copy was served the 11th of February; the defendant interposed a demurrer the 12th of March; in June following, by consent, an order was made whereby the defendant withdrew his demurrer, the plaintiffs had sixty days to amend their complaint, and the defendant sixty days to answer after the service of the amended complaint. On the 12th of July, 1887, the plaintiffs served the amended complaint. On the 16th of September thereafter, the defendant, upon the affidavit of his attorney, applied, *ex parte*, to the judge of the court for further time within which to answer. The affidavit disclosed substantially the foregoing facts. It also alleged that at the time he was served with the amended complaint he indorsed, by mistake, an erroneous date upon it, and that by reason of this and the absence of the defend-

ant he had not answered within time, and asked until the 1st of October within which to do so. The judge granted it. A copy of the order was not served upon the plaintiffs' attorney, but it appeared he was informed of it in the course of two days. On the 26th of September, 1887, the plaintiffs (the judge who made the order being out of the territory) applied to the judge of another district for a judgment by default. This judge, not aware of the extension order, signed the judgment. On the 30th of September the defendant served his answer, together with a copy of the order, giving him until October 1st, within which to answer, and then gave notice of a motion upon these facts to vacate the judgment by default. The plaintiffs appeared and objected to the judge's entertaining jurisdiction of such a motion at chambers, claiming that it was a power that could be exercised only in open court in the county, and that if the judge should entertain it the relief asked could not be granted, as there was no affidavit of merits. The judgment was vacated December 10, 1887. The record shows that the order was made "by the court," at Sioux Falls. The notice was that "a motion will be made before the Hon. C. S. PALMER" to set aside the judgment.

The statutes with reference to the points determined are stated in the head-note.

*F. L. Soper*, for appellant.

The order giving further time was void. Under section 143 the court could only extend the time before it had expired. Defendant's remedy was to be relieved from his default. Wait Code, p. 232, n. *a, b*; *Petrie v. Fitzgerald*, 2 Abb. (N. S.) 354; *Platt v. Townsend*, 3 Abb. 9; *McGowan v. Levenworth*, 2 E. D. Smith, 24.

In any event it was error to vacate the judgment without terms to the plaintiffs.

*Wm. McGrath*, for respondent.

The order extending the time was proper under section 143. The terms of the relief, even if defendant had been in default, were discretionary under this section. *Freeman Judg.*, §§ 541, 542; *Willett v. Millman*, 15 N. W. Rep. 866; *Nugent v. Nugent*, 20 id. 584.

By the Court:

The judgment of the court below is affirmed. The court holds that the order of the judge enlarging the time to answer after the statutory period had elapsed, while irregularly made and perhaps open to a motion to be set aside, was yet in effect a granting of time and binding upon appellants, and the judgment by default obtained before another judge during the pendency of such order was properly set aside on motion by the judge who granted the leave to answer, and appellants ought not to complain that it was done without terms. All concur.

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TERRITORY OF DAKOTA, Defendant in Error, v. JONES, Plaintiff in Error.

**Evidence — Documents — Admissibility.**

On a prosecution for perjury, alleged to have been committed while the defendant was testifying in his own behalf on a preliminary examination for selling intoxicating liquors in violation of law, the court, over an objection of relevancy and incompetency, permitted the prosecution to put in evidence, and the jury to take with them on retiring for deliberation a transcript of the committing magistrate's docket showing the proceedings on the examination, and his finding that there was sufficient cause to believe the defendant guilty of the offense. *Held*, error.

(Argued and determined at the May Term, 1888.)

**E**RROR to the district court, Lincoln county; Hon. C. S. PALMER, Judge.

The transcript above referred to recited the filing of an information (contents not given), the issuance of a warrant, the arrest of the defendant, his appearance, the hearing and the finding of the justice, which was as follows: "It appearing to me that the offense charged in the information has been committed, and that there is sufficient cause to believe that A. B. Jones [the defendant] is guilty thereof, I order that he be held to answer the same and admitted to bail in the sum of two hundred dollars."

There was nothing in the transcript showing what the defendant swore to on the examination.

At the time of the trial, section 383, C. Cr. Pro., was as follows: "Upon retiring for deliberation, the jury may take with them all

papers which have been received as evidence in the cause, or copies of such parts of public records or private documents, given in evidence, as ought not, in the opinion of the court, to be taken from the person having them in possession."

The other facts are stated in the head-note.

*Taylor & Willcox*, for plaintiff in error.

The court erred in admitting in evidence and allowing the jury to take to their room the transcript of the docket. The defendant was prejudiced thereby in the mind of the jury. *Somerville v. State*, 6 Tex. App. 433; § 383, C. Cr. Pro.; *People v. Dowdigan*, 34 N. W. Rep. 411; *Littlefield v. State*, 5 S. W. Rep. 650; *People v. Thornton*, 16 Pac. Rep. 244.

*Chas. F. Templeton, Attorney-General*, for defendant in error.

By the COURT :

This case is reversed upon the ground that the court erred in admitting in evidence, and permitting the jury to take to their room on retiring to deliberate upon their verdict the transcript of the justices' docket who held the defendant to answer to the grand jury. All concur.

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**SPRAGUE, Respondent, v. FREMONT, E. & M. V. R. R. Co.,  
Appellant.**

**1. Constitutional Law — Legislative Power — Police Powers.**

A statute, § 16, chap. 17, Special L. 1885, exempting ten counties of the territory from the operation of § 747, C. C. Pro., as amended, chap. 115, L. 1883, declaring owners liable for all damages done by their stock while trespassing "upon the lands of another," is valid. Such exemption is within the police power of the legislature.

**2. Same — Trespassing Stock — Common Law Rule — Application.**

In such exempted locality the rule of the common law, making stock on the lands of another trespassers, does not obtain.

**3. Same — Railroad Companies — Killing Stock — Trial — Case for Jury.**

Where in such locality S.'s stock strayed upon the defendant's railroad track, and it appeared the engineer saw it a mile and a half distant, but did not discover its presence on the track until he was about sixty rods from it; that he then whistled for brakes, they were applied, also the air

brakes; that it was down grade and there was a train of thirteen loaded cars; that the stock, instead of leaving the track, ran ahead of the train, when one was caught and killed; that the others gathered around this one, and another train following close behind ran into them and injured two others; that the engineer of the second train did not see the stock till within five rods of it; *held*, it was a proper case to submit to the jury.

(Argued and determined at the October Term, 1888.)

**A** PPEAL from the district court, Custer county; Hon. CHAS. M. THOMAS, Judge.

This was an action for killing a steer and injuring a heifer and a calf. The accident occurred in Custer county, Dakota, in September, 1886. The plaintiff, in his complaint, alleged that it was caused by the negligence of the defendant. This was denied by the company, and it alleged that the plaintiff was guilty of contributory negligence in allowing his stock to trespass upon the track.

On the trial the plaintiff testified that the accident occurred about three or four o'clock in the afternoon; that at the time he was about fifty rods from the track, and about a half a mile from the place of the accident; that he heard the engine "toot" and saw a lot of cattle run down on each side of, and on the track; that when he first saw them they were, perhaps, sixty rods ahead of the train; that they continued to run down the track and the engine to whistle till one steer was caught, thrown from the track and killed; that the other stock gathered around the dead animal, and another train about a half a mile behind ran into them, striking a heifer and a calf, breaking the hind legs of both; that the valley was level and he had a plain view of the train and the cattle; that he could discover no slackening of speed, there seemed to be no effort to slacken, but rather to scare the stock from the track; that they were freight trains loaded with cattle going south; that one could see two miles north along the track from the place of the accident; that it was a slight down grade toward the cattle; that at night he kept his stock in a corral; mornings he turned them out over the hill away from the track to graze, and gave them no more attention until evening, when he sent a boy to gather them in; that they rarely went upon the railroad track, would have to go over a mile to reach it.

The engineer of the first train testified that at the time of the accident he was going down grade around a curve at a rate of about fifteen miles an hour, when he discovered the stock on the track about sixty rods ahead; that on discovering it he whistled for brakes, they were applied by the train-men, and he also applied the air brakes; that there were about thirteen cars loaded with stock; that the accident could not have been prevented; that had he known the cattle were on the track, the distance he could have seen them he could have prevented the injury; that it is difficult to tell how near one is to stock on a curve, or to determine whether they are on the track or not; that the grade was about two and one-half feet on each side of the track; that he was about a mile and a half away when he first saw the stock, but about sixty rods distant when he discovered it on the track; that when he whistled for brakes the stock ran down the track; that he did his utmost to stop the train.

The engineer of the second train testified to striking a cow on a sharp curve; that at the time he was running at about the rate of twenty miles an hour; that he had a train loaded with stock; that he did not see the cow till he got within five rods of her; that by the time he called for brakes and applied the air brakes he struck her; that the distance was so short it was impossible to avoid the accident; that the cow was trying to cross the track when he struck her; that she came up from the left-hand side, his was the right-hand side; that they were running down a grade of about forty feet to the mile; he was following closely another train and kept a close lookout for it, and for stock which was generally found in that locality; that the country about there was level for some distance.

The other train-men of the two trains testified, corroborating the evidence of the engineers as to the efforts made to stop the trains, and there was nothing adduced in rebuttal of this testimony.

There was no request to direct the verdict.

The defendant asked the court to instruct the jury that the plaintiff was held to an "extra degree of care" in keeping his stock there, near the defendant's track. The court refused the instruction, to which the defendant excepted. The case was submitted to the jury, and they returned a verdict for the plaintiff.

The defendant moved for a new trial on the grounds of errors of law, and the insufficiency of the evidence to justify the verdict. The motion was overruled, whereupon judgment was entered and the defendant appealed.

The statutes involved are stated in the head-notes.

*J. W. Fowler*, for appellant.

The plaintiff should have kept his stock off the track. The defendant, therefore, is only liable for gross negligence. *Williams v. Northern P. R. R. Co.*, 3 Dak. 168; *Maynard v. Railroad*, 115 Mass. 460; *Locke v. Pacific R. R. Co.*, 15 Minn. 355; *Darling v. Railroad*, 121 Mass. 121.

The defendant rebutted the presumption arising from the killing, under section 679, C. C. Pro., and showed there was no negligence on its part. *Spaulding v. Railroad*, 33 Wis. 582; *Kerwhacker v. C., C. & C. R. R. Co.*, 3 Ohio St. 196; *C., H. D. R. R. Co. v. Waterson*, 4 id. 433; *C. O. R. R. Co. v. Lawrence*, 13 id. 70; *Columbus, C. & I. C. R. R. Co. v. Froesch*, 57 Ill. 155; *Chicago & A. R. R. Co. v. Purvines*, 58 id. 38; *Metropolitan R. R. Co. v. Moore*, 121 U. S. 558, 7 Sup. Ct. Rep. 1334; *Fisher v. Farmer*, 21 Wis. 74.

That the plaintiff was negligent in allowing the stock to be upon the track, see *Whart.*, §§ 883, 901; *Bellfountain R. R. Co. v. Bailey*, 11 Ohio St. 333; *Corwin v. Railroad*, 13 N. Y. 42; *Shepherd v. Buff. R. R. Co.*, 35 id. 641; *Indiana R. R. Co. v. Shimer*, 17 Ind. 295; *Jefferson, M. & I. R. R. Co. v. Dawes*, 43 id. 402; *Walker v. Herron*, 22 Tex. 55; *Joliet R. R. Co. v. Jones*, 20 Ill. 221; *N. W. & E. R. v. Skinner*, 19 Pa. St. 301.

*C. L. Wood*, for respondent.

It is contended (1), plaintiff was guilty of contributory negligence, and (2), defendant is liable only for gross negligence. As to the first, it is sufficient to say that, in the county where this occurred, cattle were free commoners upon all uninclosed lands. *Chaps.* 58, 59, 60 (§ 4), 61, 78, L. 1881; chap. 2, Special L. 1883; chap. 17, Special L. 1885; *Kerwhacker v. Cleveland, etc., R. R. Co.*, 62 Am. Dec. 246; *S. C.*, 3 Ohio St. 172; *Missouri P. R. R. Co. v. Wilson*, 28 Kan. 455.



As to the second proposition respondent contends, that if the employees of the defendant could, by the use of ordinary diligence, have seen the cattle and could, without danger, have avoided the injury, it was their duty to do so. The idea is not tolerable that an injury can be inflicted which ordinary care would have prevented. *Missouri P. R. R. Co. v. Wilson, supra*; *A., T. & S. F. R. R. Co. v. Davis*, 3 Pac. Rep. 301; *R., R. J. & St. L. R. R. Co. v. Rafferty*, 73 Ill. 58; *Illinois C. R. R. Co. v. Baker*, 47 id. 295; *Missouri P. R. R. Co. v. Reynolds*, 1 Pac. Rep. 150; *S. & Z. R. R. Co. v. Smith*, 22 Ohio St. 227; *Deering, Neg.*, § 11.

By the COURT:

This case is affirmed, the court being of the opinion:

1. That the law relating to the running at large of cattle in Custer county and other Black Hills counties is not invalid by reason of applying specially to these counties, as such law comes within the police power of the legislature, being such a subject-matter as was proper for the legislature to act upon as they deemed best for the interest of such localities.

2. That the common law that requires the owner of domestic animals to keep them upon his own premises and makes them trespassers if he suffer them to run at large, is not in accordance with the common usage and necessities of the new and growing section of the Black Hills country and, therefore, it does not apply.

3. The plaintiff may have been somewhat negligent in allowing his animals to go at large and stray upon defendant's track, and such negligence may have been only the *remote* cause of the injury to the plaintiff's cattle, and the negligence of the defendant's employees in running the train may have been the *immediate* cause of the plaintiff's loss. There being sufficient evidence in the case upon the question of negligence, the lower court did right in submitting the case to the jury.

All concur.



RATHBONE ET AL., Appellants, v. COE, Respondent.

1. Limitation of Actions — Construction — Conflict of Laws.

Where the statute of a state, where a contract was made, provided that an action on such contract "must be commenced within" six years "after the cause of action has accrued," and an action on it there had become barred, *held*, the bar was available here.

2. Same — Pleading — Sufficiency.

In such a case where the defendant sought to avail himself of the foreign statute, and in effect pleaded he had been in the foreign jurisdiction the prescribed period, so that he could have been served with process, *held*, the answer was sufficient although no facts were stated showing the statute to be one that affected the debt, rather than the remedy

(Argued and determined at the October Term, 1888.)

APPEAL from the district court, Lawrence county; Hon.  
CHAS. M. THOMAS, Judge.

This was an action upon two promissory notes, declared upon separately. They were both executed at Milwaukee, Wisconsin, and payable on demand. One was made September 27, 1876, the other November 1, 1876. There was an allegation in each count of the complaint that the defendant had resided at Milwaukee continuously from the giving of the note till some time in the year 1885. The action was commenced September 14, 1886.

In answer to each cause of action, the defendant alleged the execution and delivery of the note at Milwaukee, Wisconsin, its being payable on demand, his residence there, and that he could have been served with process in that state at any time from the giving of the note until August, 1884. No question as to the sufficiency of the allegations in these respects was made.

It was contended by appellants that the statute of limitations of Wisconsin did not extinguish the debt, merely affected the remedy, but that, if it did extinguish the debt, it was not so pleaded. The allegations of the answer with reference to the statute of that state were, that the plaintiffs allowed said note to run until a time in which an action thereon could be maintained in said state had expired; that plaintiff's cause of action was long before defendant removed from said state lost and barred by the

statute of limitations of said state, and does not now exist, as by the statute of said state it is provided that actions on obligations of the kind sued on in this action can only be commenced and maintained within six years after the cause of action has accrued, which statute defendant alleges on information and belief was, at the time of the execution and delivery of said note, and ever since has been, and now is, in full force and effect.

The defendant demurred to the answer on the ground that it did not state facts sufficient to constitute a defense to either of the notes. The demurrer was overruled; the plaintiffs electing to stand upon it, the action was dismissed and the plaintiffs appealed.

The Wisconsin statute is as follows: "The following actions must be commenced within the periods hereinafter prescribed after the cause of action has accrued." R. S., § 4219. This section applies to the instruments in suit, the period prescribed being six years.

*Martin & Mason*, for appellant.

The general rule is that where the statute of limitations is pleaded the *lex fori* governs. Wood, Limitations, § 8, n. 4; 2 Pars. Cont. 590; Townsend v. Jemison, 9 How. 407; United States v. Donnelly, 8 Pet. 361; Nash v. Tupper, 1 Cai. 402; Lincoln v. Battelle, 6 Wend. 475; Andrews v. Heriot, 4 Cow. 508, n.; Carpenter v. Wells, 21 Barb. 594; McCord v. Woodhall, 27 How. Pr. 54; Power v. Hathaway, 43 Barb. 214; LeRoy v. Crowninshield, 2 Mason, 151; Medbury v. Hopkins, 3 Conn. 472; Pearsall v. Dwight, 2 Mass. 87; Bryne v. Crowninshield, 17 id. 55; Hale v. Lawrence, 21 N. J. L. 714; Decouche v. Savetier, 3 Johns. Ch. 190; Wilcox v. Williams, 5 Nev. 206; State v. Swope, 7 Ind. 91; Haggertt v. Emerson, 8 Kan. 264; Bruce v. Luck, 4 G. Gr. (Ia.) 143; Swickard v. Bailey, 3 Kan. 505; 2 Jones, Mortg., § 1203.

This rule applies even though the action was barred in the state where it arose before the debtor removed therefrom. Wood, 18, n. 21; Ruggles v. Keeler, 3 Johns. 263; Bulger v. Roche, 11 Pick. 36; Sloan v. Waugh, 18 Ia. 224; LeRoy v. Crowninshield, 2 Mason, 151; Hale v. Lawrence, 21 N. J. L. 742; Williams v. Jones, 13 East, 439; Decouche v. Savetier, 3

Johns. Ch. 218; Loveland v. Davidson, 3 Pa. L. J. 377; Star W. Co. v. Mathison, 3 Dak. 237.

There are but two exceptions to the rule: (1) When the statute where the contract was made extinguishes the debt. Wood, 22; and (2) Where the *lex fori* provides that an action shall not be maintained where it is barred in the state where it arose. The Wisconsin statute does not extinguish the debt. R. S., §§ 4219, 4243, 4247.

If it did extinguish the debt, the pleading demurred to does not show it to be the case. Bliss Pl., § 183. There is no statute here covering the second exception, hence the *lex fori* governs.

*G. G. Bennett*, for respondent.

The general rule is correctly stated by appellants, but where the statute of the state where the contract was made extinguishes the debt itself, instead of merely affecting the remedy, and the parties have resided there during the period of limitation, it is a good defense in a foreign jurisdiction. Gaus v. Frank, 36 Barb. 323; Shelby v. Guy, 11 Wheat. 361; Townsend v. Jemison, 9 How. 419; McMerty v. Morrison, 62 Mo. 143; Story, Conf. Laws, §§ 582b, 582c; Angell, 63, n. 1; Wood, 19.

The Wisconsin statute extinguished the debt. Sprecher v. Mackly, 11 Wis. 432; Hill v. Krickle, id. 442; Knox v. Cleveland, 13 id. 247; Brown v. Parker, 28 id. 21; Angell, 63, n. 1; Shelby v. Guy, 11 Wheat. 361; Wires v. Farr, 25 Vt. 41; Davis v. Minor, 1 How. (Miss.)—; Stipp v. Brown, 2 Carter (Ind.), 647. The construction given this statute in Wisconsin is to control here. Elmendorf v. Ferry Co., 10 Wheat. 160; Smith v. Coudry, 1 How. 28; McMerty v. Morrison, 62 Mo. 140.

The answer sufficiently alleged the facts showing that the Wisconsin statute was a bar to this action.

By the COURT:

This case is affirmed, the court being of opinion (1) that the debt of the plaintiffs is barred by the statute of Wisconsin; (2) that the answer of the defendant is sufficient to allow the defendant to prove the defense. All the justices concur.

**ADAMS, Appellant, v. SMITH ET AL., Respondents.**

**1. Constitutional Law — Legislative Power — Special Legislation.**

Under the act of congress, approved July 30, 1886, prohibiting special legislation by the territories, chap. 173, L. Dak. 1887, "providing for re-locating county seats," which by its terms could apply to only one county, is void.

**2. Parties — Interest, Sufficiency of — Elections — Contests.**

Under § 6, chap. 54, L. 1885, providing that an elector of a county may contest the validity of an election to locate a county seat, *held*, such an elector could maintain an action, the purpose of which was to set aside the removal of a county seat, where the election therefor had been had under an invalid law.

**3. Appeal — Appealable Judgment.**

A judgment *pro forma*, that the complaint be dismissed and that the defendants have and recover their costs and disbursements, the costs and disbursements not having been entered, is final within the meaning of § 10, chap. 54, L. 1885, giving a right of appeal from "any final judgment" in contested election cases.

**4. Same — Reversal — Directing Final Judgment.**

Under § 25, chap. 20, L. 1887, providing that "upon an appeal from a judgment \* \* \* the supreme court may reverse, affirm or modify the judgment," *held*, the court, where it had reversed a judgment sustaining a demurrer to a complaint in a contested election case, the election being had under an invalid law, could direct the final judgment to be entered in the case.

(Argued and determined at the October Term, 1888. Judgment directed at May Term, 1889.)

**A** PPEAL from the district court, Brown county; Hon. JAMES SPENCER, Judge.

This was an election contest brought by the appellant Adams, on leave of court, under § 6, chap. 54, L. 1885, against the respondents, F. B. Smith, W. I. Steere, E. J. Mather, Horace Barnard and C. W. Swift, as county commissioners of Brown county, to contest the validity of an election, held July 12, 1887, to re-locate the county seat of that county. The defendants demurred to the complaint, and the demurrer was sustained *pro forma*; the plaintiff elected to stand on his complaint, whereupon a *pro forma* judgment dismissing the action was entered and the plaintiff appealed.

The complaint, or notice of contest, was as follows:

The plaintiff, John E. Adams, alleges, specifies and sets forth the following facts and grounds upon which the said election will be contested: 1. That he is a qualified elector of said county. 2. That the said defendants are the duly qualified and acting commissioners of said Brown county. 3. That said county is, and for many years last past has been, a duly organized county. That under and by virtue of section 4, chapter 21, Pol. C., the county seat of said county was located at Columbia in said county, and ever since said location it has remained there under the provisions of section 6 of said chapter, by reason of the fact that no place received a majority of all the votes cast at the election held under the provisions of said section. 4. That said county has a population of more than twelve thousand people, as shown by the census of 1885, and has an area of not less than forty-eight congressional townships. 5. That the counties of Brown and Cass are the only counties that have, respectively, more than twelve thousand inhabitants according to said census, and not less than forty-eight congressional townships each. 6. That the county seat of said Cass county was located at Fargo, in said county, by an act passed January 4, 1873. 7. That on the 11th of March, 1887, the legislature of said territory passed an act entitled "An act to provide for the re-location of county seats in counties where county seats have been located by a vote less than a majority of all the electors voting thereon," which last said act was approved March 11, 1887. That under and pursuant to the provisions of said act, a petition was, in the month of May, 1887, signed by more than one-third of the legal voters of said Brown county, as shown by the vote cast at the last general election, praying that the judge of the district court of the district in which said county is situated, issue an order directing an election to be held in said county for the purpose of voting upon the question of re-locating the county seat of said county, which said petition was presented to the judge of said court. And that, thereafter, the judge of said district, assuming to act under the provisions of said act, did make and sign an order directing an election to be held in said county on the 12th day of July, 1887, as prayed for in said petition, and that, thereafter, the register of deeds of said county caused a duly certified copy of said order to be published in one

of the papers designated by the board of county commissioners of said county as the official paper of said county, for at least six consecutive weeks immediately preceding said 12th day of July, 1887, and that on the said 12th day of July, 1887, pursuant to said last-mentioned act, and of the proceedings hereinbefore specified, the electors of said county met at different places in said county and voted upon the question of re-locating the county seat of said county; and that at said election a majority of the votes cast were in favor of re-locating said county seat at the city of Aberdeen in said county. That, thereafter, on the 15th day of July, 1887, the above-named county commissioners of said county met and opened the returns, and declared that a majority of the votes cast at said election on the said 12th day of July, 1887, in said county, were in favor of re-locating said county seat at the city of Aberdeen, and thereupon said commissioners declared said city to be the county seat of said county. 8. That, thereafter, on the 26th day of July, 1887, the county officers of said county removed their offices and the records, books, papers and property belonging to their respective offices and to said county from said Columbia to said Aberdeen. 9. That the said county is, and at the time of the passage of said act was, the only county in said territory which had a population of twelve thousand people as shown by the census of 1885, and an area of at least forty-eight congressional townships, and in which the county seat had been temporarily located under the provisions of said section 4, chapter 21, Pol. C., and remained the county seat under the provisions of section 6 of said chapter, by reason of the fact that no place received a majority of all the votes cast at the election held under the provisions of said section 6, and was and is the only county in said territory to which said act was, or is applicable, as the legislature well knew when it passed said act, and that the object and purpose of passing said act was to evade and nullify the act of congress, approved July 30, 1886, entitled "An act to prohibit the passage of local or special laws in the territories of the United States, and to limit territorial indebtedness, and for other purposes." 10. That he is informed and believes, and so charges the fact to be, that by reason of the facts above set forth, the said act of the territorial legislature, and all acts

and proceedings had in and about said election, are absolutely void.

Wherefore, plaintiff demands judgment that said act entitled "An act to provide for the re-location of county seats in counties where county seats have been located by a vote less than a majority of all the electors voting thereon," approved March 11, 1887, be declared unconstitutional and void, and that all acts and proceedings had thereunder be adjudged absolutely null and void, and for the return of said county offices and the records, books, papers and property belonging to the said county offices respectively and to said county to said Columbia from said Aberdeen, and for such other and further relief as may be just.

The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The court thereupon entered the following order and judgment: —

"Without expressing any opinion upon the merits of this case, as the question is to be presented to the supreme court in any event, I will, *pro forma*, sustain the demurrer and order judgment, *pro forma*, for the defendants. Upon appeal from such judgment the matter may be disposed of by the supreme court without a new trial in the court below and judgment absolute ordered as may be determined."

Judgment on demurrer: "It is ordered and adjudged that the said demurrer be sustained, *pro forma*, and the plaintiff electing to stand by his said notice of contest, or complaint, without amendment thereof, it is, *pro forma*, ordered and adjudged that the notice of contest, or complaint, herein be dismissed, and that the defendants have and recover judgment against the plaintiff for their costs and disbursements in and about this action expended. . To all of which judgment the plaintiff except and exception allowed. By the court.

James Spencer, Judge.

"Dated this 18th day of July, 1888."

The statute, the validity of which is in controversy, was as follows: An act "providing for re-locating county seats in certain cases."

"SECTION 1. That in all counties in this territory, having a population not less than twelve thousand, as shown by the census of 1885, and having an area of not less than forty-eight congressional



townships, and in which the present county seat thereof has been heretofore located under the provisions of section 6 of chapter 21 of the Political Code, by a vote less than a majority of all the votes cast at the election held under the provisions of said section 6 of chapter 21 of the Political Code, there shall be held a special election of the duly qualified voters of such counties on the 12th day of July, A. D. 1887, at which election the question of the re-location of the county seat of such counties shall be voted upon; *Provided*, that such election shall not be held in any county unless there shall be presented to the judge of the district court of the district in which such county is situated, or in his absence from such district, or in his inability to act, to the chief justice of said territory, a petition signed by at least one-third in number of the electors of said county as shown by the vote cast at the last general election, praying said judge to issue an order directing the holding of said election as provided in this act. If said judge shall find that said petition is signed by one-third of the electors of said county as above provided, he shall issue an order directing said election to be held in accordance with the provisions of this act."

In the other sections of the act provisions are made for giving notice of the election, and canvassing the votes and removing the records of the county to the place designated, all, not material to the questions here presented.

The appellant's complaint, or notice of contest, was drawn under section 6, chapter 54, L. 1885, which requires the contestant to specify the grounds of contest. The section also allows the proceeding to be maintained against the county commissioners.

The other statutes involved are sufficiently stated in the head-notes.

*James Wells (C. S. Palmer, of counsel), for appellant.*

The election is contested on the sole ground that the act "providing for the re-location of county seats," chapter 173, L. 1887, is in conflict with the act of congress of July 30, 1886, and, therefore, void.

That the object was sought to be effected indirectly, through a vote of the people, will not affect the result. It was special leg-



isolation within the meaning of the congressional prohibition. *People v. Hills*, 35 N. Y. 451; *People v. Supervisors*, 43 id. 16; *Smith, Const. & Stat. Const.*, § 97.

The act appears to be general, but from its provisions it could be made to apply only to Brown county. This is fatal. *Devine v. Commissioners*, 84 Ill. 590; *Anderson v. City of Trenton*, 42 N. J. L. 486; *Commonwealth v. Patton*, 88 Pa. St. 258.

The legislature may classify counties, but the classification must be reasonable, and based upon *actual* differences. 44 N. J. L. 365; *Attorney-General v. Boyd*, 5 Pac. Rep. 735; *State v. Pugh*, 1 N. E. Rep. 439; *State v. Anderson*, 6 N. E. Rep. 571; *In re Church*, 92 N. Y. 1; *State v. Board*, 5 At. Rep. 323; *Nichols v. Walter*, 33 N. W. Rep. 800; *McCarty v. Commonwealth*, 5 At. Rep. 215; *City v. Lackawana I. & C. Co.*, 4 Cent. Rep. 311; *Marmet v. State*, 12 N. E. Rep. 463; *State v. Donovan*, 15 Pac. Rep. 783; *State v. County*, 11 At. Rep. 135; *State v. Wood*, 7 id. 286; *State v. Herman*, 75 Mo. 340; *Robinson v. Perry*, 17 Kan. 248; *Klokke v. Dodge*, 14 Chicago L. N. 147; *McConihe v. State*, 17 Fla. 238; *Field v. Commissioners*, 36 Ohio St. 480; *McGill v. State*, 34 id. 228; *State v. Mitchell*, 31 id. 592; *Earl v. Board*, 55 Cal. 487; *City v. Gillett*, 32 Kan. 431; *Contieri v. New Brunswick*, 44 N. J. L. 58.

*Skillman & Mott, M. J. Gordon, Jenkins & Campbell*, and *J. H. Perry (G. C. Moody, of counsel)*, for respondents.

Appellant is not the proper party to maintain this action. The statute contemplates a contested election — an election where the question is which place had the highest, or the requisite number of votes? Laws 1885, chap. 54. There is no such question here. An elector, resident, or tax payer without special interest cannot maintain an action of this character where the public only are interested.

This appeal is premature. There is no “final” and appealable judgment. Chap. 54, § 10, L. 1885; *Champion v. Plymouth*, 42 Barb. 441; *Sherman v. Postley*, 45 id. 348; *Beinhour v. Gleason*, 44 Hun, 556; *Smith v. Hart*, 44 Wis. 230. In fact there has been no decision, only a formal order, and a transmission of the case here for determination. Before an appeal will

lie there must be a final judgment not only in form, but in substance. U. S. R. S., § 1869; C. C. Pro., § 22.

On its face the statute is general and seems to be a classification of counties wherein county seats may be changed. The act of congress prohibits special laws making these changes, but not such as provide methods for that purpose. The evil sought to be remedied was the arbitrary location of county seats by the legislature without consulting the people interested. If the act is construed to prohibit methods, then the legislature is without power on this subject, for every such law must operate locally. If the power to classify is conceded, its extent is solely for the legislature. A law including but one county in a class would be as valid as if it included all but one. It is unreasonable to suppose congress intended to prohibit any legislation on this subject which would necessarily be the case if the legislature could pass no law which would operate locally. This general statute does not violate the letter or spirit of the act. *State v. Spaupe*, 34 N. W. Rep. 164; *State v. Pond*, 6 S. W. Rep. 469; *Rogers v. People*, 12 Pac. Rep. 843; *State v. Graham*, 16 Neb. 614; *State v. Podget*, 19 Fla. 518.

By the COURT:

The *pro forma* judgment upon respondents' demurrer is reversed upon the ground:

First, that appellant's action was properly brought, and the act of the legislature of the territory of Dakota, passed March 11, 1887, under which the election was held by which the county seat of Brown county, D. T., was removed from Columbia to Aberdeen, is in conflict with the act of congress approved July 30, 1886, prohibiting special legislation in the territories of the United States.

Second, that the appellant has such an interest in the subject-matter as enables him to maintain this action.

Third, that the judgment rendered is such a final judgment as entitles him to an appeal. All concur.

REPORTER:—The case was then remanded "to the district court for further proceedings according to law and the judgment of this court," when an appeal was taken to the Supreme Court of

the United States and there dismissed for want of jurisdiction. *Smith v. Adams*, 130 U. S. 167, 9 Sup. Ct. Rep. 566. After the case was remanded to this court, the appellant, on notice, moved the court, at the May Term, 1889, to direct the district court of Brown county to enter a final judgment disposing of the case without permitting the defendants to answer. The statute with reference to the power of the court on appeal is stated in the fourth head-note.

*C. S. Palmer*, for the motion.

*Gamble Bros.* and *J. H. Teller*, contra.

In the state from which this statute, § 25, chap. 20, L. 1887, was taken, a final judgment will be rendered by the supreme court only where issue has been joined, trial had, and all the facts are before the court. It is only where there is nothing further to be acted upon by the court below. *Person v. Merrick*, 5 Wis. 231; *Boyd v. Sumner*, 10 id. 41. This construction ought to be followed here. Under similar statutes, see *Everest v. Ferris*, 17 Minn. 466; *Phelan v. Supervisors*, 9 Cal. 16; *Bagley v. Eton*, 10 id. 149; *Pierson v. David*, 1 Ia. 23.

The judgment of the October Term cannot be modified further than the insertion of the costs on appeal to the supreme court of the United States.

Under section 141, C. C. Pro., the district court, in its discretion, would have a right to permit the defendants to answer. After the judgment of reversal, the case stood the same as if the court below had overruled the demurrer. *Freem. Judg.* (2d ed.), § 481.

REPORTER :—The court granted the motion and directed the entry of final judgment, in form, substantially as prayed in the complaint.

**EVANS, Appellant, v. HUGHES COUNTY, Respondent.****1. Constitutional Law — Exclusive Ferry — Police Power.**

Section 55, chap. 29, Pol. C., Comp. L., § 1862, authorizing county commissioners to grant ferry leases to the highest bidders, is not invalid as being in conflict with § 1889, R. S. U. S., prohibiting the legislatures of the territories from granting "especial privileges," as such power is a proper police regulation.

**2. Contract — Parties — Privity.**

There is no such privity of contract between a lessor and the assignee of a lease as will enable the latter to maintain an action against the former to recover back the consideration paid for the lease (under a claim the lease was void); even though it be admitted the consideration paid belonged to the assignee.)

(Argued and determined at the October Term, 1888.)

**A** PPEAL from the district court, Hughes county; Hon. JAMES SPENCER, Judge.

This is an action to recover back money paid for, and under a ferry lease, on the ground the lease was void. At the trial the court sustained an objection to the introduction of any evidence under the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The complaint alleged that heretofore the commissioners of said county represented that they had the power to sell and let a certain ferry privilege across the Missouri river at Pierre in said county; that, relying upon said representations and believing them to be true, one W. P. Ledwich, under the advertised invitation of said commissioners, bid, for a seven years' lease of said ferry, \$800 for the year 1881; \$1,000 for the year 1882; \$1,100 for the year 1883; \$1,300 for the year 1884; \$1,400 for the year 1885; \$1,500 for the year 1886; \$1,600 for the year 1887; that on the 9th day of September, 1881, said commissioners undertook to sell, let and grant said privilege, and did sell, let and grant said privilege to said Ledwich in accordance with his said bid; that, by reason of said representations, pretended right, power and authority to grant said privilege, said Ledwich paid into the county treasury of said county under said contract and for said privilege, \$800 on the 1st day of September, 1881, and \$1,000 on the 10th day of January, 1882, and said money was, at said time, and now is, the money of this plaintiff, but has been appropriated to its own use by said county; that on

the 24th day of June, 1882, the said Ledwich duly assigned his right and interest in said money and said contract to this plaintiff; that plaintiff duly presented to the county commissioners of said county a bill for the said sums so paid, and demanded payment thereof, and they refused to pay the same; that, at the several times herein mentioned, the said county did not own said ferry privilege, and it had no right, power or authority to sell or let an exclusive privilege of ferry to said Ledwich, and the said contract did not in fact convey to him an exclusive right to maintain a ferry as therein covenanted, and the title and right of said county to sell or let an exclusive privilege has failed and does wholly fail, and the said county has failed and does wholly fail to keep its covenants in said contract; that said Ledwich fully performed all of the conditions of said contract on his part until informed and advised of conditions broken by said county; that he put a good and substantial ferry-boat on said ferry, but he never enjoyed any exclusive right of ferriage thereon nor profited by said contract, but continually lost money by reason of the maintaining of another ferry-boat or boats on said so-called exclusive privilege.

A copy of the bid was attached to and made a part of the complaint. In terms it did not appear to be for an exclusive ferry, but made in "accordance" with the advertisement. The advertisement was not in the record. Attached to and a part of the complaint was a copy of the recorded proceedings of the commissioners in accepting Ledwich's bid and leasing the ferry. They authorized the letting of the ferry "which shall extend two miles up and two miles down the Missouri river from the foot of Pierre street in Pierre \* \* \* in accordance with the statutes in relation to the letting of ferries." The lease, afterward executed by the chairman of the board, a copy of which was also made a part of the complaint, was of an "exclusive right to operate and maintain a ferry." The answer in the case was a general denial. Upon the sustaining of the objection to the evidence and the dismissal of the action the plaintiff appealed.

The statutes involved will be found referred to in the head-note.

*H. E. Dewey*, for appellant.

Sections 54 to 62, chapter 29, Pol. C., in so far as authority is

given the commissioners to grant exclusive ferry privileges, are void as being in conflict with section 1889, R. S. U. S. The attempted grant having failed, appellant is entitled to recover as for money had and received. The grant was of an "especial privilege" within the meaning of section 1889. 2 Blackstone, 37; Truckee R. Co. v. Campbell, 44 Cal. 89; Charles R. B. Co. v. Warren B. Co., 11 Pet. 429; Bouvier Dic.; Angell & A., § 4; California S. T. Co. v. Alta T. Co., 22 Cal. 401; Boone Cor., § 35; Cooley, Const. Lim. 393; 73 Ill. 541; 45 Mo. 17, 20; Piscataqua B. Co. v. N. H. B. Co., 7 N. H. 35.

A general assignment of a contract carries with it all rights of action growing out of and incident to it. Waldron v. Willard, 17 N. Y. 466; Sherman v. Elder, 24 id. 384; Brickley v. Wells, 33 id. 521. Here it appears the money paid was appellant's. He was the real party in interest aside from the specific assignment.

*Coe I. Crawford*, for respondent.

Granting ferries is a proper exercise of police power. Cooley, Const. Lim. 593; Conway v. Taylor, 1 Black, 603; Chilvers v. People, 11 Mich. 43; Fleming v. Gregorie, 16 How. 534, Carter v. Brush, 25 Wend. 631; 15 Pick. 253; Thorpe v. Rutland & B. R. Co., 27 Vt. 140; Territory v. O'Connor, 5 Dak. 397, 37 N. W. Rep. 765.

The assignment carried with it no right to recover back money paid by the assignor. Kaolatype E. Co. v. Hoke, 30 Fed. Rep. 444.

By the COURT :

The judgment in this case is affirmed. 1. Because the respondent had a right to lease the ferry privilege to Ledwich, the assignor of the appellant, by virtue of its police power, and in so doing did not violate the provisions of section 1889, R. S. U. S. 2. Because there was no such privity of contract existing between the parties as would enable the appellant to maintain this action against the respondent. All of the justices concur.

Gossage, Appellant, v. Pennington County, Respondent.

**Statutes — Construction — Contract — Construction.**

Chapter 52, Laws 1888, provided that the county treasurer shall charge and collect a certain sum as "compensation for publishing" the notice of delinquent tax sale, "which sum shall be paid into the county treasury, and the county shall pay the costs of publication." Section 1, chapter 51, approved March 11, 1887, provided that "in all cases where publication of legal notices of any kind are required, \* \* \* the person \* \* \* shall be required to pay" the rates therein specified. A party contracted with a county to publish "all notices \* \* \* at the established rates approved March 11, 1887." Part of the work done by him was publishing the delinquent tax list. *Held*, his compensation therefor was to be determined by the act of 1887, not by what the treasurer had charged, and that the 1887 rate was in accordance with the terms of his contract. CARLAND, J., dissenting.

(Argued and determined at the October Term, 1888.)

**A** PPEAL from the district court, Pennington county; Hon. CHAS. M. THOMAS, Judge.

This is an appeal from a judgment entered upon an agreed state of facts, wherefrom it appears that the county commissioners of Pennington county advertised for bids "for the county printing for the year 1887;" that the bid of the plaintiff was accepted April 11, 1887; that as to the matter in controversy it was that he would publish "all notices in the *Daily or Weekly Journal* at the established legal rates approved March 11, 1887;" that he published the notice for the sale for the delinquent taxes for the year 1886; that in making up his account for this he charged twenty cents for each tract, and ten cents for each town lot included in each description; and when more than one town lot was included in one description he charged the same as though it had been described alone; that the list published was correct according to the copy furnished by the county treasurer; that the treasurer charged the owners for advertising each of the said tracts the same as though they had been separately advertised; that plaintiff presented to the commissioners a bill for \$912.90 for this work; that they allowed him \$222.25 therefor. The plaintiff appealed to the district court from this allowance, and the court on the foregoing facts affirmed the action of the commissioners, whereupon plaintiff appealed to this court.



The bill presented to the commissioners was on the basis of the rates that could be charged under chapter 52, Laws of 1883, and that had been charged delinquents by the treasurer. The rates allowed by the commissioners were those provided by section 1, chapter 51, Laws of 1887.

Chapter 52, Laws of 1883, was as follows: "An act providing compensation for publishing tax sale."

"SECTION 1. The county treasurer shall charge and collect, in addition to the taxes and interest and penalty, the sum of twenty cents on each tract of real property, and ten cents on each town lot advertised for sale, which sum shall be paid into the county treasury, and the county shall pay the costs of publication; but in no case shall the county be liable for more than the amount charged to the delinquent lands for advertising." The remaining sections relate to the repeal of other acts and when this shall go into force.

The 1887 act, by which plaintiff's compensation was determined, so far as material, is stated in the head-note.

*Mitchell & King and William Gardner*, for appellant.

Appellant's proposal was to publish the tax list "at legal rates." The question is, are those rates prescribed by chapter 52, L. 1883, or by chapter 51, L. 1887. It is not disputed but that the rates charged were according to the former chapter, and appellant is entitled to the amount unless the 1887 act repealed the prior law. The legislature from the beginning has contemplated and provided for two classes of printing, the tax list and legal advertisements. § 61, chap. 28, Pol. C.; § 22, chap. 39, Pol. C.; chap. 52, L. 1883; chap. 53, L. 1883; chap. 51, L. 1887.

Chapter 52, L. 1883, and chapter 51, L. 1887, are not irreconcilable. *Potter Dwarris St.* 144; *Metropolitan T. Co. v. Pennsylvania Co.*, 25 Fed. Rep. 761; *Schwenke v. Union D. Co.*, 4 Pac. Rep. 906; *McCool v. Smith*, 1 Black, 659; *Wood v. U. S.*, 16 Pet. 342; *Hartford v. U. S.*, 8 Cr. 109; *Brace v. Schuyler*, 4 Gilm. 271; *Hume v. Gossett*, 43 Ill. 299; *Fowler v. Perkins*, 77 id. 274; *Wragg v. Penn. T.*, 94 id. 16; *People v. Brayton*, id. 343; *East St. Louis v. Maxwell*, 99 id. 441; *Bar v. People*, 103 id. 112; *U. S. v. Langston*, 118 U. S. 390; *Crow Dog*, 109 id. 556; *Chew Heong v. U. S.*, 112 id. 536; *State v. State*, 17 Wall. 425;



*Furman v. Nichol*, 8 id. 44; *Attorney-General v. R. R. Co.*, 35 Wis. 425.

The act of 1883 was special, for the regulation of a single subject, and is not repealed by the general affirmative act of 1887 which has no repealing clause. *Ottawa v. LaSalle Co.*, 12 Ill. 339; *Gunnahrson v. City*, 92 id. 573.

*W. I. Walker*, for respondent.

The inquiry is, what were "legal rates" at the time this contract was made, April 11, 1887? Chapter 52, L. 1883, was intended to provide compensation for publishing the notice and makes the county liable instead of the treasurer (as was the case under section 61, chapter 28, Pol. C.); but it was not intended to provide the amount the county should pay; this was fixed by section 1, chapter 58, L. 1883, and so remained till the act of 1887, chapter 51, when it was changed, and this change governs here.

By the COURT:

The judgment in this case is affirmed for the reason that the amount allowed appellant for printing the tax list of the respondent for the year 1886, is in accordance with his contract, and with section 1, chapter 51, L. 1887, which fixes the legal rate for such printing. All concur except CARLAND, J., dissenting.

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O'NEILL, Appellant, v. MURRY, Respondent.

**1. Abatement and Revival — Replevin, Survival of**

Under § 85, C. C. Pro., providing that "No action shall abate by the death \* \* \* of a party, \* \* \* if the cause of action survive," and authorizing the court to "allow the action to be continued by or against his personal representative or successor in interest," the court, in an action of replevin, where the defendant pleaded title and right of possession to the property, allowed the action upon the defendant's death to be continued by his personal representative. *Held*, proper.

**2. Attorney and client—Scrivener—Communications—Evidence.**

Under sub. 1, § 499, C. C. Pro., providing that "an attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment," an attorney employed for the purpose of drawing certain conveyances (the execution of which had been determined upon before consulting him) may testify as to what was said and done at the time of their execution as bearing on an issue of their being absolute, or conditional merely.

**3. Pleading — Proof — Replevin.**

In an action of replevin where the plaintiff (his complaint being in the ordinary form) sought to recover under a bill of sale for the defendant, the court, under a general denial, and plea of title and right of possession in the defendant, permitted him to introduce evidence tending to show that the bill of sale, though absolute in form, was in fact a mortgage. *Held*, proper.

(Argued and determined at the October Term, 1888.)

**A**PPEAL from the district court, Lawrence county; Hon. CHAS. M. THOMAS, Judge.

This was an action by the appellant, Peter O'Neil, to recover the possession of certain horses, cattle, wagons, grain and farm machinery from one John W. Murry. The complaint contained the usual allegations of ownership, right to possession, that the property had been wrongfully taken and was so detained by the defendant. The answer denied all of the allegations of the complaint, and, "further answering," the defendant alleged: "That, at the times mentioned in the said complaint, the personal property therein described, and each and every portion thereof, was and still is the property of the defendant, and not of the plaintiff; and the whole of the said personal property and chattels were then rightfully in the possession of this defendant. That the said personal property and chattels, and the whole thereof, have been delivered to the plaintiff upon his claiming the immediate delivery thereof at the commencement of this action, to the damage of this defendant for the said delivery, and for the detention of the said property in the sum of \$2,000." There was the usual prayer for a return of the property or its value and damages.

The defendant having died after the answer was interposed, his wife, Cynthia A. Murry, the respondent, suggested the death, also, that she had been appointed administratrix of his estate, and asked that the action be continued and that she be substituted as defendant. The plaintiff objected to this on the ground that the action did not survive. The court granted the application, to which the plaintiff excepted. The case then proceeded to trial. The plaintiff claimed title and the right to the possession of the property under a bill of sale from Murry and his wife. The administratrix contended that the bill of sale had been given to secure the payment of a debt—was a mortgage merely—and the

plaintiff was not entitled to the possession of the property. It appeared, that, in March, 1881, Murry and his wife executed a note to one Richard R. Coyne, due in four months; that, to secure the payment of this note, they executed mortgages on their farm, certain town lots and the personal property in controversy; that this note and the mortgages had been assigned to the plaintiff; that thereafter, in November, 1881, Murry and his wife executed to the plaintiff a deed of the farm and all of the lots excepting the one they were living on, also a bill of sale of the personal property in controversy, it being the same as that mortgaged except certain parts that the plaintiff released at the time of the execution of the bill of sale; that as a part of the transaction the plaintiff executed to Murry and his wife a lease of the farm and the personal property in controversy. The plaintiff contended this entire transaction was a settlement and satisfaction of the indebtedness of the Murrys to him, and that all of the instruments were what they purported to be on their face — absolute. The lease having expired, the plaintiff sought to recover possession of the personal property under his bill of sale. In the condition of the pleadings, as above stated, the court admitted evidence tending to show that the bill of sale was a mortgage. It also appeared on the trial that the plaintiff had one Allen, an attorney at law, draw the deed and bill of sale. The court, over the objection of the plaintiff, permitted this attorney to testify as to what was said by the parties and himself as to the matter at the time of the execution of the instruments. Allen had not been acting as an attorney in any transaction between the parties to the instruments. It appeared the plaintiff came to him first, directed what papers he wanted drawn, that Allen drew them and was paid for that work; that he had drawn papers for the plaintiff before, and had afterward acted for him in this matter against Murry and his wife.

[With the testimony of Allen in the record it could hardly be contended there was no substantial conflict in the evidence as to the real object of the bill of sale. In view of the decisions of this court in such case, and the evidence being voluminous, the reporter has deemed it best not to bring it into this report.]

The jury returned a verdict for the defendant for a part of the

property. The plaintiff made a motion for a new trial which was denied. Judgment having been entered in favor of the defendant the plaintiff appealed.

The sections of the O. C. Pro. involved are stated in the head-notes.

*McLaughlin & Steele*, for appellant.

The action of claim and delivery under the code is in the nature of replevin at common law; it is founded on a *personal* wrong and does not survive. *Pitts v. Hale*, 3 Mass. 321; *Mellen v. Baldwin*, 4 id. 480; 1 Wait Pr. 152; *Badlam v. Tucker*, 1 Pick. 284; *Meritt v. Lambert*, 8 Gr. 128; *Webber v. Underhill*, 19 Wend. 447; *Burkley v. Luce*, 1 N. Y. 163; *Hopkins v. Adams*, 6 Duer, 685; *Potter v. Van Vranken*, 36 N. Y. 619; *Putnam v. Van Buren*, 7 How. Pr. 31; *Freeman v. Frank*, 10 Abb. Pr. 370; *Mosely v. Mosely*, 11 id. 105; *Kissam v. Hamilton*, 20 How. Pr. 369; *More v. Bennett*, 65 Barb. 341; *Clark v. McClelland*, 9 Pa. St. 128; *Wells, Rep.*, § 801; *Heinmuller v. Gray*, 44 How. Pr. 260. The action having abated a new summons and plea was necessary to revive it. No personal wrong was imputed to the administratrix, and she could not be substituted. *Green v. Watkins*, 6 Wheat. 261; *Macker v. Thomas*, 7 id. 530. There is no authority to introduce new parties except by amendment or supplemental pleading. *Caledonia G. M. Co. v. Noonan*, 3 Dak. 189. It was plaintiff's privilege to prosecute or discontinue the action. The defendant's answer was one of denial merely, it set up no new matter constituting a defense, or counter-claim.

To show the bill of sale a mortgage it was necessary to plead it, and there should have been an offer to redeem. 2 Jones, Mortg., §§ 1093-1113; *Marsh v. McNair*, 1 N. E. Rep. 660, 99 N. Y. 180; *Stevens v. Cooper*, 1 Johns. Oh. 425; *Ward v. McNaughton*, 43 Cal. 159; *James v. McKenron*, 6 Johns. 543; 16 N. Y. 297; 1 Jones, § 282. The deed, bill of sale and lease were one transaction and conclusively showed a settlement and change of ownership in the property and could not be contradicted. *Holcomb v. Mooney*, 11 Pac. Rep. 274; 2 Pars. Cont. 547-557; 1 Addison (3d ed.), § 242; 2 Whart. Ev., §§ 920, 921; C. C., §§ 921, 969. It is clearly contemplated by sections 1724, 1726, 1740, 1741, O. C., that a contract

in writing is required to render a conveyance of real property a mortgage, *i. e.*, a contract in writing to change a contract in writing. Such construction would give effect to all of these sections.

*Strict proof* was required, the evidence was insufficient. Murry was estopped by the lease from disputing plaintiff's title, and his administratrix was in no better position. 2 Smith L. Cas. 754.

Allen was the plaintiff's attorney; his testimony was incompetent. Pol. C., chap. 18, § 4, sub. 4; C. C. Pro., § 499; 1 Gr. Ev., §§ 236-242; 1 Whart. Ev., §§ 576, 581; Chirac v. Reinicker, 11 Wheat. 280; Jenkenson v. State, 5 Blackf. 465.

*Martin & Mason*, for respondent.

Continuing the action and substituting the administratrix without further pleading was correct. C. C. Pro., § 85; Wait Code, § 121; Moore v. Hamilton, 44 N. Y. 666; Livermore v. Brainbridge, 43 How. Pr. 272; Gordon v. Sterling, 13 id. 405; Allen v. Walter, 10 Abb. Pr. 379; Coon v. Knapp, 13 How. Pr. 175; Greene v. Bates, 7 id. 296; Stocking v. Hanson, 22 Minn. 542; Van Santvoord Pl., 101. Replevin at common law did not abate by the death of the sole plaintiff. The defendant in this case is in the position of a plaintiff, and the action would have survived even at common law. Replevin, in most of the states, survives the death of either plaintiff or defendant. Keite v. Boyd, 16 S. & R. 300; Coleman v. Woodworth, 28 Cal. 568; Halleck v. Mixer, 16 id. 574; Curtis v. Herrick, 14 id. 117; Barrett v. Birge, 50 id. 665; Russell v. Dennison, 45 id. 337; Judson v. Love, 35 id. 463; Best v. Vedder, 58 How. Pr. 187; Doedt v. Wiswall, 15 id. 128; 1 Chitty Pl. 69; Bliss, §§ 39, 43. This property passed to the administratrix for the purpose of administration. C. C., §§ 361, 777; Probate C., §§ 210-213; Belk. Prob. L., § 1582.

The evidence showing the bill of sale a mortgage was proper. Under the plea of property the defendant could show title no matter how derived. Wells, §§ 685, 686, 688; O'Connor v. Union Line, 31 Ill. 236; Martin v. Watson, 8 Wis. 130; Dermott v. Wallace, 1 Black, 96. A lien transfers no title. C. C., §§ 1706, 1707; Everett v. Buchanan, 2 Dak. 264. The evidence was admissible in an action at law as well as equity. C. C., §§ 1724,

1726; Cal. C. C., § 2925; *Cunningham v. Hawkins*, 27 Cal. 603; *Jackson v. Lodge*, 36 id. 29; *Vance v. Lincoln*, 38 id. 586; *Manufacturers' Bank v. Rugee*, 18 N. W. Rep. 251; *Taylor v. McClain*, 2 Pac. Rep. 399; *Butts v. Privett*, 14 id. 247; *Babcock v. Wyman*, 19 How. 289; *Villa v. Rodgnez*, 12 Wall. 323; *Pengh v. Davis*, 96 U. S. 332; *Britton v. Lorenz*, 45 N. Y. 51; *Nicklin v. Nelson*, 5 Pac. Rep. 51; *Darst v. Murphy*, 9 N. E. Rep. 887; *Miller v. Thomas*, 14 Ill. 428; *McMillan v. Bissell*, 29 N. W. Rep. 737; *Melms v. Pflister*, 18 id. 255; *Rockwell v. Humphrey*, 15 id. 394; *Hughes v. Sheaff*, 19 Ia. 335; *Russell v. Southard*, 12 How. 139.

Allen's testimony was admissible. He was not employed as an attorney in the transaction concerning which he testified. It is only communications in the course of an employment that are privileged. C. C. Pro., § 499. These statements were not within the rule. *Gallagher v. Williamson*, 23 Cal. 332; *Hager v. Shurdttler*, 29 id. 64; *Britton v. Lorenz*, 45 N. Y. 51; *Coveney v. Tannahill*, 1 Hill, 33; *Bank v. Synden*, 5 How. Pr. 254; *Hatton v. Robinson*, 14 Pick. 416; 1 Whart. Ev., §§ 587, 588, 589.

There was not merely a "substantial conflict" in the evidence, but a vast preponderance in favor of the verdict. It cannot, therefore, be disturbed.

By the COURT:

This case is affirmed, the court being of the opinion:

1. That the cause of action stated in the counter-claim of the defendant, John W. Murry, deceased, survives, and that the order of the court substituting and continuing his administratrix as party defendant was proper and legal.

2. That the parol testimony tending to show that the bill of sale executed by Murry to the plaintiff, although absolute on its face, was, in fact, a mortgage, was properly admitted, and the question whether such bill of sale was absolute or only a mortgage was properly left to the jury.

3. That while the acts of the witness Allen, the scrivener, who prepared the bill of sale, in revealing the conversation between himself and the plaintiff is not to be commended, still, we do not think that the relations between them were of such character as

to render such conversations privileged within the rule governing communications between attorney and client.

4. That there was sufficient evidence to support the verdict.

All concur.

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SIOUX FALLS NATIONAL BANK, Respondent, v. FIRST NATIONAL BANK OF SIOUX FALLS ET AL., Appellants.

**1. Banks and Banking — National Banks — Receivers — Parties.**

A receiver, under the National Bank Act, is entitled to be substituted as sole defendant in actions pending against the bank at the time of his appointment.

**2. Same — Appeal, Right of — Attachment.**

A national bank, after the appointment of a receiver, has no authority to appeal from an order refusing to dissolve an attachment made before the receiver's appointment.

**3. Same — National Banks — Powers — Cashier's Check — Liability.**

Where a national bank issued its cashier's check to a county treasurer in order that he might effect a settlement of his accounts with the board of county commissioners, *held* (the board having no notice of any defense to the check), that on the settlement the check immediately became the property of the county, that the bank could assert no want of power to issue the same, nor the existence of any fact that might be a defense between itself and the treasurer. *Held*, also, that the transferee of the check would succeed to the rights of the county and in an action on the check, would, as a matter of law, be entitled to a verdict against the bank.

(Argued and determined at the October Term, 1888.)

**A** PPEAL from the district court, Moody county; Hon. JAMES SPENCER, Judge.

This was an action by the respondent, as transferee, against the appellant upon its cashier's check. It appeared that in January, 1886, the county treasurer of Minnehaha county, Dakota, required more funds than he was in possession of to make his settlement with the board of county commissioners. To make up the deficiency he applied to the appellant, the First National Bank of Sioux Falls, where he had been depositing, to get the required funds. He had nothing on deposit, but upon his statement that the funds would be required only a few minutes, and that he would return them, the cashier (the president of the bank consenting) issued



to the treasurer the check in suit. The following is a copy of it :

" No. 91.

SIoux FALLS, Dak., Jan. 12, 1886.

" The First National Bank of Sioux Falls, pay to the order of C. K. Howard, county treasurer, sixteen thousand five hundred and seventy-one and  $\frac{61}{100}$  dollars.

" \$16,571.61.

W. F. FURBECK, *Csr.*"

The treasurer indorsed the check in blank, and the commissioners, that evening, January 12, 1886, accepted it with the other funds and made a settlement with him. They then turned the funds, including the check, over to his bondsmen pending his procuring additional security, as one of his bondsmen had left the territory. The bondsman in whose custody the funds were placed took them to the plaintiff bank, where they were deposited about 2 P. M., January 13, 1886. There was no other indorsement on the check than that of the treasurer. The plaintiff bank credited the depositor with the check, and on the same day, presented it to the defendant bank for payment. Payment was refused, whereupon this suit was brought, January 14, 1886. It appeared the plaintiff had advanced nothing, nor had it incurred any liability on account of the check until the 19th of January, 1886. On the 1st of March, 1886, the plaintiff caused an attachment to be levied upon the property of the defendant bank, and on the 9th, the court denied a motion to dissolve the attachment. Two days after this the controller of the currency, under section 5234, R. S. U. S., appointed a receiver of the bank. The receiver upon his appointment, qualification and taking possession of the property, applied to the court to be substituted as party defendant. The court refused this, but ordered that he be made a party defendant, to which he excepted.

The capital stock of the defendant was \$50,000.

At the trial the only material issue of fact was whether or not the plaintiff was a *bona fide* holder of the check for value. On this issue, upon the plaintiff's application to direct a verdict, the court held: "There is no evidence \* \* \* that the plaintiff had notice of any irregularity in the issuance of this check, or that there was any defense to it in the hands of any one, until the evening of January 13." It, therefore, directed a verdict as requested.



There was no evidence that the board of county commissioners, at the time they took the check, had any notice of the facts or circumstances under which it was issued.

Upon the denial of a motion for a new trial final judgment was entered. After the entry of the judgment the defendant bank, August 28, 1888, appealed from the order denying the application to dissolve the attachment, and the receiver and defendant bank appealed from the judgment.

*Wilkes & Wells, Boyce & Boyce* and *T. N. Noyes*, for appellant bank.

The check was without consideration and in excess of the powers of the bank. Green Brice *Ultra Vires*, p. 225, *n. a*; Rand. Com. P., §§ 472, 476. The commissioners had no authority to receive it from the treasurer. *Clay Co. v. Simmons*, 1 Dak. 431; *Halbert v. State*, 22 Ind. 120; *Shelton v. State*, 53 id. 331; *State v. Harper*, 6 Ohio St. 607; *Perley v. County*, 32 Mich. 132; S. C., 20 Am. Rep. 637; *State v. Miss. Co.*, 74 Mo. 413; *Swartwout v. Bank*, 5 Denio, 555. There can be no estoppel against showing an act made void by statute. Bigelow (4th ed.), 544; *Franklin v. Lewiston S. I.*, 68 Me. 43; *Morse*, 302.

The attachment should have been dissolved. *Butler v. Coleman*, 124 U. S. 721, 8 Sup. Ct. Rep. 718.

*T. B. McMartin*, for the receiver.

The court should have allowed the substitution. R. S. U. S., § 523; Ball Nat. Bks., p. 232; Bolles, § 328; *Kennedy v. Gibson*, 8 Wall. 498; *Bank v. Pahquioque*, 14 id. 383; *Harvey v. Allen*, 16 Blatchf. 29; *Casey v. Galli*, 94 U. S. 673; *Bank v. Kennedy*, 17 Wall. 87; § 85, C. C. Pro.; Wait Code, § 121, pp. 139, 143, 145; 1 Wait Pr. 159; *Tracy v. Bank*, 37 N. Y. 525; *Claffin v. Bank*, 54 Barb. 229; *Codle v. Baker*, 20 Wall. 650.

The court erred in directing the verdict. There were no funds to represent the check. If it should be called a loan, it was without authority. The bank could not loan more than a tenth of its capital stock to one individual, and it was beyond the power of the cashier to make a loan at all. These defenses would be available were the instrument negotiable, and the plaintiff an innocent purchaser, neither of which we claim exists in this case. Further,

the check was delivered conditionally only, and the condition was broken. R. S., § 5200; Ball. Nat. Bks., p. 184; Browne N. B. Cas. 487; Cannonsburg I. Co. v. Union N. B., 4 Cent. Rep. 261; Morse, 204; Pa. Bank v. Frankish, 91 Pa. St. 343; Briggs v. Holmes, 10 Cent. Rep. 629; Anderson v. Kissam, 35 Fed. Rep. 699. The bank had no power to loan its credit. R. S., § 5136; Johnson v. Charlottesville Nat. Bk., 3 Hughes, 657; Ball, 50, 100, 102; Browne N. B. Cas. 195, 203; Farmers & M. Bk. v. Troy Bk., 1 Dong. (Mich.) 457; Claffin v. Farmers & C. Bk., 25 N. Y. 293; Bank v. Patchen, 13 id. 309. The county was in no better position than Howard. It had no authority to receive the check. Pol. C., chap. 28, §§ 48, 49, 42, 43, 95, 96, 102; Pol. C., chap. 5, § 14; Cawley v. People, 95 Ill. 246; Stern v. People, 102 id. 543; Berry v. Hamby, 1 Scam. 468; Hewitt v. Noman, 94 Ill. 533; School District v. Fogleman, 76 id. 190; People v. Johnson, 100 id. 539; Heald v. Bennett, 1 Dong. (Mich.) 513; Dickinson v. Gilliland, 1 Cow. 481; Herriman v. Sherman, 24 Kans. 387; Wright v. Bailey, 26 Tex. 730; Jackson v. Bartlett, 8 Johns. 361; Beers v. Henderson, 45 N. Y. 665; Ward v. Smith, 7 Wall. 447; Goden v. Patterson, 13 Ia. 256; Elliott v. Miller, 8 Mich. 132; Woodbury v. Lewis, Walk. (Ch.) 259. The test is, could Howard have compelled the county to take the check in part payment. The plaintiff bank, knowing the check was a county fund, was not an innocent holder. It also knowing there was no consideration for it before parting with any thing of value, it ought to have charged it back to the depositor. Dresser v. Missouri C. Co., 93 U. S. 93; Man v. Bank, 1 Pac. Rep. 583; Bank v. Racine, 37 Mo. 420; Bank v. Valentine, 18 Hun, 417; Dougherty v. Bank, 93 Pa. St. 227; Jordan v. Bank, 74 N. Y. 467; Bank v. Bank, 1 Hall, 619; Hubbard v. Chapin, 2 Allen, 328; Holcomb v. Wyckoff, 35 N. J. L. 36; Hollman v. Hobson, 8 Humph. 127; Bank v. Chapin, 8 Metc. 40; Buller v. Harrison, 2 Cowp. 565; Clarke v. Bank, 52 Barb. 592; Platt v. Chapin, 49 How. Pr. 318. The plaintiff was not a purchaser in good faith in the ordinary course of business. C. C., §§ 1852, 2105; Daniel, §§ 769, 799; Am. L. Rev., Feb., 1885, p. 86; Kennedy v. Otoe C. Bank, 7 Neb. 59; Merchants' Nat. Bank v. State Bank, 10 Wall. 604; Thomp. N. B. Cas. 46; Ball, 54; Morse, 108.

*H. H. Keith*, for respondent.

There was no error as to the substitution. *Case v. Terrill*, 11 Wall. 199 ; *Kennedy v. Gibson*, 8 id. 506 ; *Bank v. Pahquioque*, 14 id. 383 ; *Myers U. S. Cas. on Banks*, 326 ; *Rosenblatt v. Johnston*, 104 U. S. 833 ; *Bank v. Kennedy*, 17 Wall. 21 ; *Security Bk. v. Bank*, 2 Hun, 287 ; *Chemical N. Bk. v. Bailey*, 12 Blatchf. 480 ; § 82, C. C. Pro.

The court cannot set aside the order sustaining the attachment.

The verdict was properly directed. The defendant is estopped to deny the validity of the check in the hands of the plaintiff. *Pickard v. Sears*, 6 Ad. & Ell. 475 ; *Dezell v. Odell*, 3 Hill, 215 ; *Brown v. Brown*, 30 N. Y. 541 ; *Merchants' N. Bk. v. State Bk.*, 10 Wall. 604 ; *McWilliams v. Mason*, 31 N. Y. 294 ; *McNeil v. Tenth N. Bk.*, 46 id. 325 ; *Cooke v. State Bk.*, 52 id. 115 ; *Morse v. Mass. N. Bk.*, 1 Holmes, 209 ; *Pope v. Bank*, 59 Barb. 226 ; *Farmers & M. Bk. v. Butchers & D. Bk.*, 14 N. Y. 623 ; *Safford v. Wyckoff*, 4 Hill, 442 ; *House v. Williams*, 10 Paige, 326 ; *Dowe v. Shutt*, 2 Den. 621 ; *Dezell v. Odell*, 3 Hill, 215 ; *Zabriskie v. R. R. Co.*, 23 How. 381. See, also, *Hern v. Nichols*, 1 Salk. 289 ; *Swan v. British A. Co.*, 7 H. & M. 603 ; *Knox Co. v. Aspinwall*, 21 How. 539 ; *Bissel v. City*, 24 id. 287 ; *Moran v. Commissioners*, 2 Black, 722 ; *Marshall v. Schenck*, 5 Wall. 772 ; *R. R. Co. v. Schuyler*, 38 Barb. 536 ; *S. C.*, 34 N. Y. 30. The check was valid, and it was an absolute appropriation by the bank of sufficient money to pay it. *Merchants' N. Bk. v. State Bk.*, 10 Wall. 604 ; *Florence M. Co. v. Brown*, 8 Sup. Ct. Rep. 531 ; *Morse* (2d ed.), 202 ; *Bolles*, § 231. It pledged the credit of the bank the same as a certificate of deposit or certified check. It was the same as money. *Morse*, 307 ; 2 *Daniels*, § 1601 ; 2 *Pars. B. & N.* 74 ; 2 *Rand. Com. P.*, § 645 ; *F. & M. Bk. v. B. D. Bk.*, 16 N. Y. 125 ; *Meads v. Merchants' Bk.*, 25 id. 143 ; *First N. Bk. v. Leach*, 52 id. 350 ; *Pa. Bk. v. Frankish*, 91 Pa. St. 344 ; *Bolles*, § 224 ; *Cooke v. State N. Bk.*, 52 N. Y. 96 ; *Bickford v. First N. Bk.*, 42 Ill. 238 ; *Claffin v. Farmers & C. Bk.*, 25 N. Y. 300. The rule that a treasurer cannot receive a promissory note in payment of taxes, etc., has no application here.

Immediately on the deposit the plaintiff acquired title to the

check and became the debtor of the depositor. *Chambers v. Miller*, 13 C. B. (N. S.) 125; *Oddie v. Bank*, 45 N. Y. 735; *Bank v. Millard*, 10 Wall. 152; *Commercial Bk. v. Hughes*, 17 Wend. 100; *Terhune v. Bank*, 34 N. J. Eq. 367; *Morse*, 321; *Nat. Bk. v. Burkhardt*, 100 U. S. 686; *Metropolitan Nat. Bk. v. Lloyd*, 25 Hun, 101; *S. C.*, 90 N. Y. 530; *Cragie v. Hoadley*, 99 id. 133; *Hoffman v. Nat. Bk.*, 46 N. J. L. 604; *St. Louis & S. F. R. R. Co. v. Johnston*, 27 Fed. Rep. 243; *Nat. C. Bk. v. Howard*, 3 How. Pr. (N. S.) 512; *Bolles*, § 20; *Ayers v. Farmers & M. Bk.*, 79 Mo. 421; *Bank v. Bank*, 10 Wheat. 329; *Nat. Bk. v. Peck*, 127 Mass. 298; *Scott v. Ocean*, 23 N. Y. 289; *Keene v. Collins*, 1 Metc. (Ky.) 415; *Brahm v. Selkins*, 77 Ill. 263; *In re Franklin Bk.*, 1 Paige, 254; *Seventh Nat. Bk. v. Cook*, 73 Pa. St. 483; *S. C.*, 13 Am. Rep. 751. The check was commercial paper, and the burden of showing the plaintiff was not a *bona fide* holder was on the defendants. *Pa. Bk. v. Frankish*, 91 Pa. St. 339; *Fifth N. S. Bk. v. First Nat. Bk.*, 7 Atl. Rep. 318; *Credit Co. v. Howe M. Co.*, 8 id. 472; *Goodman v. Simonds*, 20 How. 343; *Murry v. Lardner*, 2 Wall. 110; *Swift v. Smith*, 102 U. S. 442; *Goetz v. Bank*, 119 id. 551; *Hamilton v. Marks*, 63 Mo. 167; *Welch v. Sage*, 47 N. Y. 143; *Nat. Bk. v. Young*, 41 N. J. Eq. 531; *Morton v. N. O. & S. R. R. Co.*, 79 Ala. 590.

By the COURT:

The judgment in this case is affirmed, the court holds:

1. The court erred in denying the motion of the receiver to be substituted as sole defendant in the action.

2. The appeal taken by the defendant bank, after the appointment of the receiver, from the order refusing to dissolve the attachment, was unauthorized and must be dismissed.

3. The cashier's check sued upon in this action, upon its delivery to Howard as treasurer, immediately became the property of the county and the defendant bank could not be heard to assert its want of power to issue the same, or the existence of any fact which might be a defense between itself and Howard in his individual capacity; and the plaintiff bank, having, by the transfer, succeeded to all of the rights of the county, there was no error in directing the verdict of the jury.

All concur except SPENCER, J., not sitting.

## OBERN, Respondent, v. GILBERT ET AL., Appellants.

**Mortgage — Release — Covenant — Warranty — Breach.**

Where, in a mortgage-deed of three lots with general covenants of warranty of the premises, it was provided one of the lots should be released upon the payment of a certain part of the debt, *held*, the mortgagor was entitled to a decree releasing the lot on the partial payment notwithstanding his title to the other two lots had failed where the granting clause of the mortgage was "all the right, title, interest, claim and demand" of the mortgagor to the lots. *Held, also*, there was no breach of covenant upon which the mortgagee could recover in such case.

(Argued and determined at the October Term, 1888.)

**A** PPEAL from the district court, Lawrence county; Hon. W. E. CHURCH, Judge.

This was an action by George Obern against Sarah A. Gilbert and Nathan S. Gilbert, to foreclose a mortgage. The mortgage was given to secure the payment of fourteen promissory notes of \$114.28 each. It was dated September 1, 1878, matured in fifteen months, and was upon three lots, one of which was a homestead. It contained a provision that upon the payment of \$1,000, the homestead lot should be released. After nine of the notes had been paid, and there had been a default as to the balance, this action was brought to foreclose and sell all of the property for their satisfaction.

The mortgagors answered, setting up that they had complied with the conditions of the mortgage so far as it related to the homestead lot, and asked that it be decreed to be released from the operation of the mortgage. The plaintiff replied that the agreement to release was inserted upon the express representation of the mortgagors that they had good title to the other two lots; that they warranted the title and agreed to defend the same; that their representations were false, and by reason thereof, plaintiff had only the homestead for security.

The case was tried by the court, and it found that the homestead, at the time of the giving of the mortgage, was worth \$900, and the other two lots about \$1,500; that at that time the mortgagors occupied the two lots, but that in 1880, another person acquired title to them from the United States. It also found that prior to

the commencement of this action, the first nine notes (amounting to over \$1,000) had been paid. There was no finding that there had been any express misrepresentation by the mortgagors as to the title to the lots. The court decreed that the homestead lot should be sold to pay the balance of the debt. After the denial of a motion for a new trial the defendants appealed.

The instrument was a mortgage-deed in form, but the granting part was limited in these words: "All the right, title, interest, claim and demand which the said party of the first part has in and to the following described lots." The releasing clause followed the description of the property, and was in these words: "It is understood and agreed that as soon as the sum of one thousand dollars of the sum hereby secured shall be paid, then the lot on Treasure street [the homestead], above described, shall be released from this mortgage." The warranty clause was in the usual form, being of the "premises," not the "interest," and against every person except the "United States."

The defeasance and enforcement conditions were also in the ordinary form.

*G. G. Bennett*, for appellants.

The grant was only of the mortgagors' interest and the warranty is limited to that. *Lamb v. Wakefield*, 1 Saw. 251; 3 Washb. 466, 474, 607; *Lamb v. Kamm*, 1 Saw. 238; *Hope v. Stone*, 10 Minn. 119; *Blanchard v. Brooks*, 12 Pick. 66; *Allen v. Holton*, 20 Pick. 458; *Hoxie v. Firney*, 16 Gray, 332; *McNear v. McComber*, 18 Ia. 12; *Holbrook v. Debo*, 99 Ill. 372; *Kimball v. Semple*, 25 Cal. 441; *Gee v. Moore*, 14 id. 472. The mortgagee could not have maintained an action on the warranty for a failure of title to the two lots.

The right to have the homestead released under the provision in the mortgage was clear. Such provisions have often been enforced. *Jones, Mortg.*, §§ 79, 981; *Evertson v. Ogden*, 8 Paige, 275; *Patty v. Pease*, id. 277; *Fowler v. Elwood*, 66 Ill. 438; *Bingham v. Avery*, 48 Vt. 602.

The payment in effect released the homestead. *Jones*, § 974; *Griswold v. Griswold*, 7 Lans. 72; *Fowler v. Elwood*, *supra*; *Merrill v. Chase*, 3 Allen, 339; *McNair v. Picatte*, 33 Mo. 57.

*Martin & Mason*, for respondent.

This warranty is one of title. Where a party conveys all his right, title and interest and covenants to warrant and defend the premises, the covenants refer to the lands described and not the right, title or interest of the grantor. *Funk v. Griswell*, 5 Ia. 65; *Loomis v. Bedel*, 11 N.H. 74; *Mills v. Catlin*, 22 Vt. 104; *Jackson v. Wright*, 14 Johns. 193; *Jackson v. Hubble*, 1 Cow. 613; *Williamson v. Test*, 24 Ia. 138; *Hubbard v. Heath*, 23 Tex. 614; *Taylor v. Holter*, 1 Mon. 706, 3 Washb. (4th ed.) 477, Rawle Cov. 529.

The intention of the parties to the mortgage is to control in its interpretation. C. C., §§ 927, 932, 612, 935, 164. It should not be construed as a quit-claim deed. C. C., § 633, subd. 4, §§ 624, 605, 1727, subd. 2; *Cadiz v. Majors*, 33 Cal. 288; *McDonald v. Edmonds*, 44 id. 328; *Clark v. Baker*, 14 id. 612; *Sherman v. McCarthy*, 57 id. 507; *Williamson v. Test*, *supra*. Counsel's citations are only to such deeds.

The clause agreeing to release is modified by the provision in relation to enforcing the mortgage in case of default. *Pierce v. Kneeland*, 16 Wis. 673.

It would be inequitable to enforce the agreement for a partial release. He who seeks equity must do equity. *Taylor v. Holter*, 1 Mon. 706; *Lull v. Stone*, 37 Ill. 227; *Clark v. Baker*, 14 Cal. 612; 3 Pom. Eq., §§ 1404, 1405, 889, 899.

By the COURT :

This case is reversed on the ground that the district court erred in subjecting the homestead lot to the mortgage, it having been discharged therefrom by payment under the terms of the mortgage. There was no breach of the covenants of the mortgage upon which the mortgagee could recover. All concur.



LUCE, Respondent, v. AMERICAN MORTGAGE AND INVESTMENT  
COMPANY, Appellant.

1. Mortgage — Extinguishment — Homestead, Incumbrance of.

Under § 3, chap. 38, Pol. C., providing that an incumbrance of a homestead shall be of no validity unless signed by husband and wife, *held*, that after a mortgage on the homestead had been paid the husband alone could do no act whereby the mortgage could be revived for the purpose of securing another obligation.

(Argued and determined at the February Term, 1889.)

**A**PPEAL from the district court, Lake county; Hon. J. E.  
CARLAND, Judge.

This was an action by the respondent Herman N. Luce against the appellant company, to recover damages and a statutory penalty for the company's refusal to satisfy a certain mortgage.

It appeared that in September, 1885, the plaintiff had certain liens upon his homestead, amounting to about \$1,700, some of which were not then due. To satisfy these liens he entered into an arrangement with the defendant whereby it took a mortgage of \$2,000 upon the homestead, and agreed to pay them off. Among the liens was a mortgage to the New England Loan and Trust Company. When appellant paid this lien it took an assignment of the mortgage instead of a satisfaction. Under a claim that the \$2,000 was not sufficient to pay the liens, it then caused the plaintiff to give his note for the difference, and some other small claims against him, and to secure the note, \$265, he signed the following indorsement upon the New England Loan and Trust Company mortgage note: "I hereby agree to leave this note and mortgage attached, as collateral to a note of \$265.00, due February 28, 1886. H. N. Luce." At the time of the indorsement the property described in the mortgage was the plaintiff's homestead. Subsequent to these transactions the plaintiff sold the homestead, and the purchaser reserved out of the consideration an amount sufficient to discharge the New England company mortgage. After the amount had been paid to the appellant and the mortgage discharged, the plaintiff brought this action.

The plaintiff contended that the \$265 note and the security indorsement were obtained without consideration, and by means of



threats. This was denied by the defendant. Under the view taken of the case by the court below this contention did not become material, as it instructed the jury that if they found the New England company note and mortgage had been paid by the \$2,000 mortgage, then the matter of the indorsement need not be considered by them. At the close of the evidence, counsel for each party requested the court to direct a verdict in his favor. These requests were denied, the court determining to submit the matter of payment to the jury. There being practically no issue on this, the jury returned a verdict for the plaintiff for the amount that had been paid to discharge the mortgage, and also the statutory penalty prescribed by section 1735, C. C. After a motion for a new trial had been denied, and final judgment entered, defendant appealed.

*Bailey & Davis* and *R. A. Murray*, for appellant.

The question for determination is, did the transaction between the parties *necessarily* extinguish the New England Loan and Trust Company mortgage so that it could not be kept alive by the subsequent agreement of the parties? Under the original arrangement it was appellant's duty to pay, but this could be changed by agreement which was done. 39 Vt. 241. It was the intention of the parties that the mortgage should not be extinguished. This must control. *Goulding v. Bunster*, 9 Wis. 466; *Champney v. Coope*, 32 N.Y. 543; *Jones, Mort.*, §§ 944, 945; *Sheddy v. Gerau*, 113 Mass. 378.

*H. H. Keith* and *C. P. Bates*, for respondent.

A mortgage that has been paid is *functus officio*, and cannot be revived by any subsequent agreement. *Ledyard v. Chapin*, 6 Ind. 320; *Kellogg v. Ames*, 41 Barb. 218; *Mead v. York*, 6 N. Y. 449; *Kortright v. Cady*, 21 id. 343; *Stoddard v. Hart*, 23 id. 556; *Holman v. Bailey*, 3 Metc. 55; *Merril v. Chase*, 3 Allen, 339. The cases cited by appellant are distinguishable in that in all of them at the time the payment was made, it was the intention of the parties to keep the mortgage alive. See, also, *Pelton v. Knapp*, 21 Wis. 72; *Harbeck v. Banderbilt*, 20 N. Y. 395.

The mortgage being upon the homestead, it could not be re-

vived by this indorsement of the husband alone. § 3, chap. 38, Pol. C.; *Spencer v. Fredendall*, 15 Wis. 736.

By the COURT:

The judgment of the lower court is affirmed.

This court holds that under the facts in the case the giving of the \$2,000 mortgage by Luce to the defendant was a payment of the New England Loan and Trust Company's mortgage, and the plaintiff Luce could afterward do no act to invest it with any validity. All concur except McCONNELL and CARLAND, JJ., not sitting.

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McKAY, Respondent, v. SHOTWELL ET AL., Appellants.

**1. Chattel Mortgages — Validity — After-Acquired Property — Accounting for Proceeds.**

A mortgage of a stock of goods and such goods as might thereafter be added to the stock "by way of replenishing" it, is valid under section 1704, C. C., which provides that "an agreement may be made to create a lien upon property not yet acquired." This replenishing provision would not render the instrument void on its face, for of itself, it would give no right to sell except to replenish.

**2. Same — Trial — Question of Law.**

Where in such case the mortgage property had been attached, and there was no evidence of fraud in fact, or that the mortgagors, while in possession, had disposed of any of the mortgaged property for their own benefit, *held*, proper for the court to direct a verdict in favor of the mortgagee in an action of replevin against the parties who had taken it from his possession on the attachment.

**3. Same — Evidence — Materiality.**

In an action of replevin by a mortgagee against attaching creditors, the issue being the validity of the mortgage, the fact of whether or not the mortgagee in foreclosing the mortgage after the attachment had been made had given the requisite notice, or the fact of the amount of the property they sold, is immaterial. So, also, the mortgagors being in possession after the execution of the mortgage and prior to the attachment, it not appearing that they had disposed of any of the property during the time.

(Argued and determined at the February Term, 1889.)

**A** PPEAL from the district court, Lake county; Hon. J. E. CARLAND, Judge.

This was an action in claim and delivery by respondent Alexander McKay, against the appellants, Theodore Shotwell, A. M.

Clerihew, Wm. Lothman and Wm. Lee, sheriff, to recover possession of a stock of goods upon which respondent had a mortgage. Appellants, defendants below, took the goods from the possession of respondent, plaintiff, on an attachment against his mortgagors on the ground that the mortgage was fraudulent as against them. The value of the goods and the taking as alleged in the complaint was admitted by the answer; the only issue was the validity of the plaintiff's mortgage, which was attacked because of certain provisions it contained. The mortgage was executed by Bergstreser Brothers, on the 5th of April, 1888, to secure twelve of their past-due promissory notes to the plaintiff. It covered their stock of general merchandise of all kinds and outstanding accounts, "together with all of the store furniture, fixtures and property in and about said store, and also any and all goods and merchandise of every name and kind that shall hereafter be placed by us in said store by way of replenishing our present stock of goods aforesaid. The true intent and meaning hereof is that we intend to mortgage all our property of every kind in and about said store to secure the payment of the debts hereinafter mentioned, the same being for the purchase-money of the property so mortgaged as security for payment to said Alexander McKay of \$2,002.24, with interest thereon as expressed in twelve promissory notes." Then follows a description of the notes; covenant of ownership and right to mortgage; provision that in the event of their default, or their "attempting to dispose of or remove" the property, or if the mortgagee deem himself insecure, then, in any such event, he, or his assignee, might take possession and sell the property to satisfy the debt and expenses. As will be seen, there was no provision whereby the mortgagors were given the right to possession other than its implication from the provision as to replenishing the stock, and the one giving the mortgagee the right to possession in the event of their default, or deeming himself insecure. Neither were there any of those provisions usually found in such instruments whereby sales are permitted upon the proceeds being accounted for. The mortgage was filed for record the day of its execution; the mortgagee took possession of the property the next day and it was attached in his hands the same day by the defendants. On the trial the plaintiff offered his

mortgage in evidence and the defendants objected to it on the ground that it was void on its face in that the instrument taken together, permitted the mortgagors to remain in possession and dispose of the property in the usual course of business. This objection was overruled and the defendants excepted.

The defendants inquired of the witness who foreclosed the mortgage for the plaintiff, subsequent to the attachment, if he posted notices of sale, also how much of the property plaintiff sold to pay the mortgage. The court sustained objections to these inquiries as being immaterial, also an objection to an inquiry of one of the mortgagors, if, after he gave the mortgage on the 5th, his store was not open for business "down until the closing time in the evening." The witness afterward in answer to a question, if he sold any goods from the time he executed the mortgage till the mortgagee took possession, said: "I don't remember that I did. I don't know."

There was no evidence tending to show that the mortgagors did not honestly owe the plaintiff the amount of the notes, nor was there any evidence tending to show that the mortgage was not given for the sole purpose of securing the payment of the debt evidenced by the notes. In other words, there was no fraud in fact shown. The only substantial contention of the defendants was, that the mortgage was fraudulent on its face. At the close of the evidence, the court, upon the application of the plaintiff, directed the jury to return a verdict in his favor, to which the defendants excepted. After the denial of a motion for a new trial and the entry of final judgment the defendants appealed.

*Wm. McGrath and Parlman & Stoddard*, for appellants.

The clauses permitting the mortgagors to remain in possession and replenish the stock, contemplated continuing the business as before and disposing of the proceeds of the sales as the mortgagors saw fit. This rendered the mortgage invalid, and it should not have been admitted in evidence. *Griswold v. Sheldon*, 4 N. Y. 581; *Southard v. Benner*, 72 id. 424; *Bracket v. Harvey*, 91 id. 214; *Robinson v. Elliott*, 22 Wall. 513, *Boone, Mort.*, § 283.

The evidence as to posting notices of sale should have been admitted. Also, that as to the mortgagors being in possession after

the execution of the mortgage. The evident purpose was to show possession for the purpose of sale. If it was for that purpose, there being no provision as to the disposition of the proceeds, the mortgage was void. Appellants should have been permitted to show the amount of property sold, as there may have been property in plaintiff's hands subject to the attachment.

The case should have been submitted to the jury. The mortgagors were in possession for a time; this, with the provision to replenish, and none to account, raised an issue of fact. *Bissell v. Hopkins*, 3 Cow. 165; *May v. Walter*, 56 N. Y. 8; *Tilson v. Terwilleger*, id. 273; *White v. Cole*, 24 Wend. 116; *Swift v. Hart*, 12 Barb. 530; *Butler v. Vosburg*, 1 N. Y. 196.

*R. A. Murray, Bailey & Davis and Winsor & Kittredge*, for respondent.

There is no claim that the demand secured was not an honest debt. Appellants' contention as to the mortgagors' right to possession cannot prevail. § 1733, C. C. Their construction of the "replenishing" clause is unwarranted. It does not mean a right to first diminish, but rather to replenish and an extension of the mortgage over the stock as replenished. This is permissible. § 1704, C. C. If the language implied a right to sell it would not be to convert the proceeds, but to replenish. The right to sell is negatived by the provision authorizing the mortgagee to take possession in case the mortgagors attempt to dispose of the property. The mortgage should be construed in accordance with an honest intention. *Gay v. Bidwell*, 7 Mich. 519. This provision covering after-acquired property did not invalidate the mortgage. *Robinson v. Elliott*, 22 Wall. 523; *People's Sav. Bk. v. Bales*, 120 U. S. 556, 7 Sup. Ct. Rep. 679; *Hunter v. Bostwick*, 43 Wis. 583; *Ronnely v. Converse*, 71 id. 524; *Hughes v. Cory*, 20 Ia. 399.

The evidence as to posting notices was immaterial. It was after the attachment and it could make no difference whether the mortgage was foreclosed or not. The same may be said as to the mortgagors' possession after the execution of the mortgage; if, however, there was error here, it was cured by the witnesses afterward testifying there were no sales made. The amount of property sold was immaterial, as it was after the attachment, and

appellants had not paid the mortgage. § 1754, C. C. The plaintiff was entitled to all of the property. *Madison Nat. Bk. v. Farmer*, 5 Dak. 282, 40 N. W. Rep. 345.

By the COURT:

The judgment of the district court is affirmed for the following reasons:

1. By section 1733, C. C., a mortgage does not entitle the mortgagee to the possession of the property unless authorized by the express terms of the mortgage.

2. Section 1704 provides that an agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence.

3. The mortgage does not contain any provision allowing the mortgagors to dispose of the goods and apply the proceeds, or any part thereof, to their own use.

4. If the language of the mortgage fairly implies any right of the mortgagors to sell, it could only be by the terms of the mortgage for the purpose of buying goods to replenish the stock.

5. There was no evidence tending to show that after the execution of the mortgage the mortgagors sold any of the stock with the knowledge or assent of the mortgagee, or applied any proceeds to their own use.

6. The mortgage was not fraudulent in law, and there being no evidence tending to show that it was fraudulent in fact, it was not error for the trial court to direct a verdict for the plaintiff.

7. The testimony excluded is not deemed material, and there was, therefore, no error in the ruling of the court below. All concur, except McCONNELL and CARLAND, JJ., not sitting.

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TERRITORY, Defendant in Error, v. ELY, Plaintiff in Error.

**1. Evidence — Mortgage — Subscribing Witness — Criminal Law.**

In a prosecution for obtaining property under false pretenses, the pretenses being with reference to the transfer of an alleged fraudulent mortgage, the court admitted the mortgage in evidence without calling subscribing witnesses. *Held*, proper.

**2. False Pretenses — Defense — Sufficiency.**

Though one might be personally liable on his assignment of an instru-

ment, still, that would furnish no defense for obtaining money under false pretenses by means of the assignment.

### 8. Trial — Argument of Counsel — Appeal to Prejudice.

In a prosecution for obtaining property under false pretenses by means of a mortgage which the defendant claimed was given to him for a patent right, the prosecuting attorney, in his closing argument to the jury, stated: "Some one has said there are three kinds of robbers; daylight robbers, robbers in the night and patent-right robbers." *Held*, these remarks would not warrant granting a new trial.

(Argued and determined at the February Term, 1889.)

**E**RROR to the district court, Beadle county; Hon. JAMES SPENCER, Judge.

The plaintiff in error, Irving W. Ely, was indicted for obtaining property under false pretenses. It appeared one Miles, the prosecuting witness, sold to him certain personal property for \$500. Part of the consideration paid, \$220, was cash, and the balance consisted of a note, \$280, payable to the order of Ely, secured by a chattel mortgage, which Ely assigned to Miles. Both instruments appeared to have been executed by one L. Braddock. The false pretenses were predicated on the passing of this note and mortgage off on to Miles. It was charged in the indictment that the defendant represented the instruments to be genuine, and the property described in the mortgage to be in existence, all of which representations, it was alleged, were false. The mortgage purported to have been executed in the presence of two witnesses. The prosecution offered it in evidence without calling either of the subscribing witnesses. The defendant objected to its introduction on the ground that no foundation had been laid — "no proof of instrument." The objection was overruled and an exception taken. The record showed no claim, or offer of proof on the part of the prosecution, that the signatures of the witnesses were not genuine.

The prosecution made no proof that the note and mortgage had been presented to the defendant, or that he had failed, or refused, to pay them. The defendant testified on this point that the instrument had not been tendered back to him; that he had never been called upon to pay the note. He also testified: "I have always been ready and willing to fulfill my contract of indorsement on that note. Am ready to pay it now." The indorsement referred to was in these words: "Huron, April 8, 1886. I hereby



assign all my interest in the within note to M. H. Miles, with recourse. Irving W. Ely." The note was dated March 19, 1886, and matured October 19, 1886.

The defendant testified he obtained the note and mortgage from Broaddock, the mortgagor, on the sale to him of a patent right. At the time of the trial the defendant testified he was a farmer by occupation. The district attorney, in his closing argument to the jury, stated: "Some one has said that there are three kinds of robbers: daylight robbers, robbers in the night, and patent right robbers." Defendant, by his counsel, asked an exception to these remarks, whereupon the court stated: "You may have the exception." The court in its charge to the jury made no reference to the remarks.

The defendant having been convicted, and his motion for a new trial overruled, sued out this writ after the rendition of final judgment.

*A. B. Melville*, for plaintiff in error.

The subscribing witnesses should have been called. *Jackson v. Waldron*, 13 Wend. 178, 196; *Willoughby v. Carleton*, 9 Johns. 136; *Jones v. Underwood*, 28 Barb. 481; *Hodmett v. Smith*, 41 How. Pr. 190; *King v. Smith*, 21 Barb. 158; *Van Dyke v. Thayer*, 19 Wend. 162; *Shuby v. Champlain*, 4 Johns. 461; *True v. Druse*, 4 Wend. 313; *Losee v. Losee*, 2 Hill, 609; *Huy v. Hendrics*, 3 Cal. 427; *Stevens v. Trevin*, 12 id. 306.

If Miles could have recovered from the defendant, he was not defrauded. *People v. Walker*, 28 N. W. Rep. 873. Ely's indorsement of the note was a conditional undertaking, and there was no liability until after he was in default. 3 Kent, 88; *Story, Prom. N.*, § 135.

There should be a new trial because of the remarks of the prosecuting attorney to the jury. *Smith v. People*, 8 Pac. Rep. 920; *Sasse v. State*, 32 N. W. Rep. 849; *People v. Ovid*, 25 id. 302; *Clark v. State*, 5 S. W. Rep. 115.

*T. L. Skinner*, Attorney-General, and *W. B. Sterling*, for defendant in error.

The mortgage was not offered to prove its genuineness, but as a



part of the transaction by which Miles was defrauded. Subscribing witnesses in such case need not be called. *People v. Marian*, 29 Mich. 31; *People v. Sharp*, 19 N. W. Rep. 168.

That Miles might be able to collect the amount of the note and mortgage from Ely was immaterial to the issue of the latter's having defrauded the former. *Commonwealth v. Coe*, 115 Mass. 481; *Commonwealth v. Tenney*, 97 id. 50; *Commonwealth v. Mason*, 105 id. 103; *State v. Thatcher*, 35 N. J. L. 445; S. C., 1 Green, C. L.

The control of the matter of argument is largely in the discretion of the trial court. There is nothing here that would warrant interference. *Epps v. State*, 1 N. E. Rep. 492; *Scripps v. Reiley*, 35 Mich. 371; *Kairns v. Trustees*, 5 N. W. Rep. 838; *Rehberg v. Mayor*, 2 N. E. Rep. 11; *Anderson v. State*, 7 id. 62. The remarks could have no application to the defendant, as he was before the jury as a farmer, not a patent right vender.

By the COURT:

The judgment of the lower court is affirmed:

1. This court holds there was no error in receiving the mortgage in evidence without the production of the subscribing witnesses — this being a criminal case and the action not being founded upon that instrument.

2. It was no defense that the prosecuting witness might eventually recover for the injury sustained.

3. The language of the district attorney to the jury was not of a character to warrant a new trial. All concur except McCONNELL and SPENCER, JJ., not sitting.

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**TERRITORY OF DAKOTA, Defendant in Error, v. KING, Plaintiff in Error.**

**1. Criminal Law — Special Plea — Sufficiency.**

A plea that the defendant has already been convicted of the offense charged in the indictment and was thereafter acquitted by the judgment of the court, is a nullity. It is not sufficient either as a plea of former conviction or acquittal.

**2. Same — Trial — Statement of Issue — Sufficiency.**

Section 343, C. Cr. Pro., provides that in a prosecution for felony, "the

clerk or district attorney must read [the indictment] and state the plea of the defendant to the jury." Where these directions had not been complied with, but it appeared the district attorney stated the offense charged, and the defendant's plea to each juror as he was being impaneled, and that after the jury had been sworn to try the case, in his opening remarks, he stated to them the allegations of the indictment in substance, the plea and the proof he expected to introduce. *Held*, that the jury were sufficiently informed of the issue they were to try, and the denial of a new trial for the omission stated was proper.

**3. Same — Instructions as to Agreeing upon Verdict.**

A jury having been out twenty-eight hours in a prosecution for felony, and having been brought in for further instructions, the court, after giving the instructions, stated to them: "I think you will be able to arrive at a verdict in this case; the case has been twice tried at a great deal of expense to this county, and it seems to me, gentlemen, that you ought to agree on a verdict." *Held*, that while these remarks were objectionable, they would not warrant setting aside the verdict.

**4. Same — Jury — Separation.**

Where, in a prosecution for felony, the jury separated after the case had been finally submitted to them, but it appeared that none of the jurors had had any communication with any one during their separation respecting the matter under consideration, *held*, their verdict should not be disturbed.

**5. Same — Verdict — Impeachment.**

A verdict cannot be impeached by the affidavits of the jurors.

(Argued and determined at the February Term, 1889.)

**E**RROR to the district court, Beadle county; Hon. JAMES SPENCER, Judge.

The plaintiff in error, Benjamin King, was indicted for an assault with intent to do great bodily harm. To this indictment he entered a plea of not guilty, and also a plea of former conviction as it was termed in the record. It was in these words: "The defendant, Benjamin F. King, on his own behalf plead to the indictment found at the February, 1888, term of the district court herein that he has already been convicted by the jury of the offense charged in this indictment, to-wit: on the 13th day of April, A. D. 1887, and thereafter discharged and acquitted by the judgment of the court herein on, to-wit: May 2, 1887." The prosecution interposed a demurrer to this plea. The court sustained the demurrer and the defendant excepted. The case then proceeded to trial on the plea of not guilty and the defendant was

convicted. The crime with which he was charged constituted a felony under the statutes of the territory.

Immediately after the rendition of the verdict the defendant gave notice of an intention to move for a new trial for substantially the following reasons: The omission of the prosecution to read the indictment to the jury and state the defendant's plea thereto, as required by section 343, C. Cr. Pro.; instructions of the court; separation of the jury and their misconduct.

It appeared by the affidavits of the defendant's counsel that after the jury were impaneled and sworn, neither the district attorney, nor the clerk of the court, read the indictment, or stated the defendant's plea to the jury. This was not controverted by the prosecution, but it appeared by the affidavit of the district attorney that in impaneling the jury he stated the offense charged in the indictment against the defendant and his plea thereto, to each juror as he was being impaneled, and that after the jury had been impaneled and sworn, in his opening remarks he in substance stated the allegations of the indictment and the plea, and also fully stated the facts he proposed to prove under the indictment.

After the jury had been sent out to deliberate on their verdict, they desired further information upon the law of the case, whereupon they were brought in and instructed in the presence of counsel for the territory and defendant. At this time they had been out twenty-eight hours, and the court in concluding its instructions used to them the language quoted in the third head-note. The defendant excepted to these remarks.

It also appeared on the motion for a new trial that immediately after the case had been finally submitted to the jury, they were permitted to separate for a five minutes recess. This was in the afternoon. In the evening eleven of the jurors were taken from their room, and with bailiffs went in a body about ten squares away to a hotel for supper. The twelfth juror, being lame and unable to accompany the others, remained locked up in the jury-room during their absence. On the following morning a like separation occurred for breakfast. After notice of the application for a new trial, the court called the jury together and examined them, and it appeared none had talked with any one as to the

matter under consideration during their separations and while they were out of their room.

It appeared by the affidavits of two of the jurors that on returning from one of their meals, one of the jurors took from the court room a copy of the Compiled Laws of the territory, which contained all of the statutory provisions concerning the crime with which the defendant was charged. It also appeared by these affidavits that these provisions of the statute were read and discussed by the jury before determining upon their verdict. On the motion of the prosecution these affidavits were stricken from the record, and the defendant excepted. The motion for a new trial having been denied and final judgment entered, the defendant sued out this writ.

*J. B. Kelley, A. B. Melville and G. C. Cooper*, for plaintiff in error.

The plea of former conviction raised an issue of fact. §§ 292, 293, C. Cr. Pro.; *Pudgen v. State*, 1 H. & T. Cr. Def. 424; *People v. Kinsey*, 51 Cal. 278.

The court coerced the verdict. *State v. Hurst*, 3 Am. Crim. Rep. 100; *State v. Bybee*, 2 id. 449.

The indictment should have been read and the defendant's plea stated to the jury. § 343, C. C. Pro. This section is mandatory. *Galloway v. Commonwealth*, 5 Cr. L. M. 143; *U. S. v. Reid*, 12 How. 361; *Territory v. Christensen*, 31 N. W. Rep. 847; 1 Bish. Cr. Pro. 91.

In case of felony injury is presumed on the separation of the jury. *People v. Backus*, 5 Cal. 275; *People v. Brannigan*, 21 id. 338; *Daniel v. State*, 2 Am. Cr. L. 421; *Maher v. State*, 3 Minn. 329.

The jury must receive the law from the court. §§ 345, 347, 377, 384, 343, C. Cr. Pro. The jurors taking the statutes in and reading them requires the granting of a new trial. *State v. Patterson*, 45 Vt. 308; S. C., 12 Am. Rep. 200; *Merrill v. Nary*, 10 Allen, 416; *Newkirk v. State*, 27 Ind. 3; *Harrison v. State*, 37 Mo. 35; *Harris v. State*, 40 N. W. Rep. 317; *Hopt v. People*, 104 U. S. 631; 18 Conn. 543; 6 R. I. 33; 50 Me. 409; 7 N. W. Rep. 607; *Merriam, Juries*, 492; 9 Am. Cr. L. M. 628. The affidavits

of the jurors should have been received. *Harris v. State, supra*; 11 Ia. 62; 20 id. 195.

*T. L. Skinner, Attorney-General*, and *W. B. Sterling, District Attorney*, for defendant in error.

The plea of former conviction was bad on its face.

The language of the court to the jury at the time they were further instructed was not coercive.

As the jury understood the precise charge against the defendant and his plea thereto, the defendant was not injured by the omission to read the indictment and state the plea. *People v. Sprague*, 53 Cal. 494; *Osgood v. State*, 25 N. W. Rep. 529; *State v. Green*, 23 id. 154.

The defendant was not prejudiced by the separation of the jury. That being so, the verdict will not be disturbed. *People v. Bonney*, 19 Cal. 427; *People v. Symonds*, 22 id. 348; *Territory v. Chenowith*, 5 Pac. Rep. 532; *Territory v. Nichols*, 2 id. 78; *State v. Bailey*, 3 id. 776; *Cook v. Territory*, 4 id. 887; *State v. Fertig*, 30 N. W. Rep. 633; *Crockett v. State*, 8 id. 603; *People v. Douglas*, 4 Cow. 26; *People v. Ransom*, 7 Wend. 493; *Eastwood v. People*, 3 Park. 44; *Thom. & M. Juries*, 396.

The verdict could not be impeached by affidavits. *People v. Carnal*, 1 Park. 256; *Wilson v. People*, 4 id. 619; *People v. Hartung*, 17 How. Pr. 87; *Dalrymple v. Williams*, 63 N. Y. 363; *Williams v. Montgomery*, 60 id. 648; *People v. Baker*, 1 Cal. 406; *People v. Doyell*, 48 id. 85; *State v. Underwood*, 57 Mo. 40; *Woodward v. Leavitt*, 107 Mass. 453; *Territory v. Taylor*, 1 Dak. 479.

By the COURT:

This case is affirmed:

1. The plea interposed by the plaintiff in error was a nullity. It was neither good as a plea of former conviction, nor as a plea of former acquittal.

2. There was no error in that part of the charge complained of, although the words used by the judge, while in some respects objectionable, were not such as to require a reversal of the case.

3. The failure of the district attorney to formally read the indictment and state the plea to the jury after they were sworn,

was not error, as the record shows that the jury were sufficiently informed of the nature of the charge against the plaintiff in error, and also of his plea — the character of his defense.

4. Under the facts as to the separation of the jury the defendant could not possibly have been prejudiced.

5. The affidavits of jurors cannot be used to impeach their verdict.

All concur except SPENCER and CROFOOT, JJ., not sitting.

6	136
1n	164
41*	736
45*	707
50*	621

### FIRST NAT. BANK OF CANTON, Appellant, v. NORTH, Respondent.

#### 1. Principal and Agent — Evidence — Declarations.

The declarations of an agent, to bind his principal, must be made at the very time he is doing the act he is authorized to do, and must be concerning the act he is then doing. The rank of the agent can make no difference in the application of this rule.

#### 2. Same — Appeal — Prejudicial Error.

On an issue that a chattel mortgage was fraudulent as against the creditors of the mortgagor (for the purpose of showing intent) the court admitted statements of the president of the mortgagee, made three days after the execution of the mortgage, at a time when an inventory of the chattels was being taken, to the effect that he marked the goods low "so parties would not attach." *Held*, inadmissible, and prejudicial error.

#### 3. Costs, Right to, on Appeal — What Recoverable.

Under § 1, sub. 3, chap. 11, L. 1883; Comp. L., § 5187, allowing the prevailing party costs "for making and serving a case \* \* containing exceptions," *held*, that such party was entitled to this allowance in the supreme court, where he had made a motion for a new trial in the court below, "on the minutes," and to review the motion he prepared and served a bill of exceptions.

#### 4. Same — Stenographer's Fees.

In such case the fees paid the stenographer for a transcript of the proceeding from which to prepare the bill is taxable under § 4, chap. 52, L. 1879; Comp. L., § 484, providing that stenographer's fees for transcripts, "shall be taxable costs."

(Argued May 8, 1888; reversed May 25; opinion filed February 11, 1889.)

**A**PPEAL from the district court, Lincoln county; Hon. C. S. PALMER, Judge.

*L. S. Swezey* and *R. B. Tripp*, for appellant.

In permitting the statements of Mr. Gale, made after the exe-

ention of the mortgage, to go to the jury, the court erred. No subsequent act or statement of an agent of the plaintiff was admissible to show what the intention of the parties was when the mortgage was executed. *Goetz v. Bank*, 119 U. S. 551, 7 Sup. Ct. Rep. 318; *Packet Co. v. Clough*, 20 Wall. 528; *Insurance Co. v. Mahone*, 21 Wall. 152-157; *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278; *Franklin Bank v. Stewart*, 37 Me. 519; *Baldwin v. Doubleday*, 8 Atl. Rep. 576; *Edwards v. Cartis*, 9 Pac. Rep. 793, 794; *Clunie v. Sacramento L. Co.*, 7 Pac. Rep. 708; *Randall v. N. W. T. Co.*, 11 N. W. Rep. 419; *Am. S. Co. v. Landreth*, 102 Pa. St. 131; *C., B. & Q. R. R. Co. v. Riddle*, 60 Ill. 534; *Story, Ag.*, § 125; *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. Rep. 118; *Sterling v. Buckingham*, 46 Conn. 461-464; *Dodge v. Childs*, 16 Pac. Rep. 815, 816; *Lane v. Bryant*, 9 Gray, 245.

That the position the agent holds does not affect the rule, see *Randall v. N. W. T. Co.*, 60 N. Y., *supra*.

It may be argued the declarations were admissible as a part of the *res gestæ* (the taking of the inventory), but this was not the purpose of the offer; it was to show the intent. Further, the statements were made on "two different occasions," without relationship to the invoice. Again, there was no issue with reference to any thing connected with the inventory of the goods, or the value thereof.

The evidence was inadmissible. A verdict has been rendered against the appellant. The presumption is, there was injury. In such cases, where the appellate court cannot say beyond a reasonable doubt the jury were not influenced by the testimony, it will reverse. Under the issue in the case, the statement of the defendant of his purpose of the proof, and the character of the statements adduced, we believe no argument is required to show the injury. On this point see, also, *Vicksburg, etc., v. O'Brien*, *supra*.

*C. B. Kennedy*, for respondent.

The real transaction entered into between the parties at the time the mortgage was made was not expressed by it. The mortgage was only a cover to it,—the covering up of the greater part of the



goods by mortgage for the benefit of the Deans, as a shield and cover to ward off creditors. The *res gestæ* of the real transaction covered every thing that was said or done with reference to these goods until the divisions provided for were made, because the divisions were a part of the agreement, and come within the rule in *Packet Co. v. Clough*, 20 Wall. 528. If it was proper to show the division and inventory of these goods, it would, under that rule, be proper to show the admissions and declarations made, accompanying the inventory. These declarations of Gale are not statements as to what took place at the time the mortgage was made, but statements made with reference to the very act he was performing for the bank. We do not question the rule of law contended for. These declarations do not come within the rule. The defendant was inquiring as to the value of the goods, which was a proper inquiry. The witness Dean had assisted in making an inventory, and by direction of Gale, acting for the bank, was directed to put them down far below their cost. It was proper to show this to show that the inventory made was no proper evidence of their value. This was an issue of fraud, and in such case the evidence may embrace all the facts and circumstances which go to make up the transaction, disclose its true character, and explain the actions and intent of the parties. 37 Mo. 102; *Bigelow, Fraud*, 477.

The agreement made by the Deans and Gale in the bank at the time the mortgage was made provided for the divisions and separations of these goods, and the invoicing of them to ascertain the amount to be taken out. The agreement being testified to, it was proper, as corroborative of it, to show the actual dealings with the goods were in accordance with its provisions. These statements, accompanying the very act he was performing for the bank, give it color, and showed that the inventory was not simply for the purpose of valuing the goods, but to keep off creditors.

TRIPP, C. J. This was an action for claim and delivery of certain goods and merchandise described in the complaint, brought by the plaintiff, as mortgagee, against the defendant, sheriff of Lincoln county, who had levied thereon under attachment against the property of M. B. Dean & Co. The defense was that



the plaintiff's mortgage was fraudulent and void as against the creditors of Dean & Co. The case was tried to a jury, and resulted in a verdict for the defendant, and from a judgment directing a return of the property the plaintiff appealed to this court.

No question was raised in the court below as to the *bona fides* of the debt from Dean & Co. to the bank, for which the mortgage was given, but it was contended that certain agreements were entered into between the bank and Dean & Co., at the time of giving the mortgage, whereby the mortgagors were to have their exemptions out of the mortgaged property, and were also to be permitted to withdraw sufficient of the goods to pay an indebtedness of \$837 due to a brother of M. B. Dean, as a preferred creditor; so that, while the mortgage upon its face secured only the indebtedness of the bank, it was intended by the parties thereto to keep off other creditors, and to hinder and delay them in the collection of their debts. Frank Dean, a brother of M. B. Dean, was sworn and examined as a witness on the part of the defendant; and he having testified that several days after the execution of the mortgage, and after it was filed for record, he assisted in making an inventory of the goods described in the mortgage, and having testified as to the value of the goods, he further stated that Gale, president of the bank, was present, and objected to the valuation of the goods as being "too high." The witness was thereupon asked by defendant's counsel the following question: "*Question.* Did Gale say why he wanted it put down so low?" The plaintiff objected to this question as irrelevant and immaterial, and upon the ground that the agent cannot bind the corporation by subsequent acts or declarations. The court then asked when this conversation occurred with reference to the giving of the mortgage; and the witness replied that "the mortgage was made Friday; we began invoicing Saturday night. This, Mr. Gale said on Monday morning." The court thereupon overruled the objection, and the witness answered: "He said on two different occasions to me that he done that so that parties would not attach."

It is difficult to see upon what theory the trial court permitted this evidence to go to the jury. The question before the court

was as to the value of the goods. The witness' acquaintance with the goods had been shown by proving that he had assisted in making an invoice of them ; and, in reply to the objection of plaintiff's counsel that testimony as to value was immaterial, counsel for defendant replied to the court : " I wish to show the *value of the goods* to show the *intent* of the parties in covering up \$4,000 worth of goods to secure a claim of \$1,800." And, under pretense of showing *value*, he was permitted to show what the plaintiff's agent did and said three days and more after the giving of the mortgage, in reference to fixing a low value in the invoice. No principle is better settled than that the agent cannot be permitted by subsequent acts or words to bind his principal. The principal is bound by the acts of his agent, done while acting as agent, and within the scope of the agency, and while so acting the language of the agent may be given to explain or qualify such acts as a part of the *res gestæ*. No one would be safe if the rule were to be enlarged or extended beyond this limit. Employers would be liable to be financially ruined by unfriendly and unprincipled agents, if their declarations as to past transactions were to stand like admissions of parties made against interest. The mere suggestion of the result proves the rule. Such declarations are the merest hearsay. Such agent is himself a competent witness, and may be called and examined as a witness relative to matters within his knowledge ; but his declarations not made under oath, nor at the time of the act given in evidence, can never be used against his principal. In *Goetz v. Bank*, 119 U. S. 551, 7 Sup. Ct. Rep. 318, it was claimed that the lower court erred in refusing to allow the plaintiff to prove the subsequent declarations of the president of the defendant bank tending to show bad faith on the part of the bank, which was one of the issues of the case. Justice FIELD, in sustaining the ruling of the lower court in rejecting the evidence, says : " The testimony was excluded, and rightly so. The declarations had no bearing upon the good faith of the officers of the bank in the transactions in this case; and, if they had, being made some days after those transactions, they were not admissible, as part of the *res gestæ*, any more than if made by a stranger. Evidence of declarations of an agent as to past transactions of his principal are in-

admissible, as mere hearsay." This is a rule laid down by all these cases. *Packet Co. v. Clough*, 20 Wall. 528; *Insurance Co. v. Mahone*, 21 id. 152; *Bank v. Bank*, 60 N. Y. 278; *Bank v. Steward*, 37 Me. 519; *Baldwin v. Doubleday* (Vt.), 8 Atl. Rep. 576; *Edmunds v. Curtis* (Colo.), 9 Pac. Rep. 793; *Clunie v. Lumber Co.* (Cal.), 7 id. 708; *Randall v. Telegraph Co.* (Wis.), 11 N. W. Rep. 419; *Steamship Co. v. Landreth*, 102 Pa. St. 131; *Railroad Co. v. Riddle*, 60 Ill. 534. The line is tautly drawn in the case of *Baldwin v. Doubleday*, *supra*, in which the court says: "The declaration of an agent, to bind a principal, must be made *at the very time* he is doing an act he is authorized to do, and must be concerning the act he is then doing." In *Edmunds v. Curtis*, *supra*, the court says of such declarations: "They must be made not only during the continuance of the agency, but in regard to the transaction pending at the very time. They must accompany the transaction or the doing of the business. They are admissible only when made as to a business matter which is being transacted at the time."

There is no tendency of the courts to relax this well-established rule, as shown by the modern cases. The tendency is rather to limit, than to extend, the admissibility of such declarations. The courts have sometimes extended the doctrine of *res gestæ* so as to allow a declaration made so soon after the act in evidence as to leave no room to doubt that the declaration was honestly prompted by the act, so as to become a part of the transaction itself. *Railroad Co. v. Coyle*, 55 Pa. St. 396.

But the supreme court of the United States is not disposed to extend the rule even to this extent. In *Railroad Co. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. Rep. 118, an accident had occurred on the road. The engineer had just left his engine, and, viewing the result of the accident, said to a person standing by that the train at the time was running at the rate of eighteen miles an hour. The person to whom the remark was made was called as a witness at the trial, and testified that the remark was made immediately after the occurrence, not to exceed from ten to thirty minutes thereafter. The court below admitted the testimony as a part of the *res gestæ*, but the supreme court reversed the case; and upon this point Justice HARLAN, in delivering the opinion of the court,

uses this pertinent language: "His declaration, after the accident had become a completed fact, and when he was not performing the duties of engineer, that the train, at the moment the plaintiff was injured, was being run at the rate of eighteen miles an hour, was not explanatory of any thing in which he was then engaged. It did not accompany the act from which the injuries in question arose. It was, in its essence, the mere narration of a past occurrence not a part of the *res gestæ* — simply an assertion or representation, in the course of conversation, as to a matter not then pending, and in respect to which his authority as engineer had been fully exerted. It is not to be deemed part of the *res gestæ* simply because of the brief period intervening between the accident and the making of the declaration. The fact remains that the occurrence had ended when the declaration in question was made, and the engineer was not in the act of doing any thing that could possibly affect it. If his declaration had been made the next day after the accident, it would scarcely be claimed that it was admissible evidence against the company; and yet the circumstance that it was made between ten and thirty minutes — an appreciable period of time — after the accident cannot, upon principle, make this case an exception to the general rule. If the contrary view should be maintained, it would follow that the declarations of the engineer, if favorable to the company, would have been admissible in its behalf, as part of the *res gestæ*, without calling him as a witness — a proposition that will find no support in the law of evidence. The cases have gone far enough in the admission of the subsequent declarations of agents as evidence against their principals." See, also, to the same effect, *Lane v. Bryant*, 9 Gray, 245; *Dodge v. Childs*, 16 Pac. Rep. 815. Nor does it matter what may be the rank of the agent. The president has no more power to bind the bank than has the cashier or teller, by his declarations as to past transactions. *Randall v. Telegraph Co.* (Wis.), 11 N. W. Rep. 419; *Bank v. Bank*, 60 N. Y. 278.

The defendant admits the correctness of the rule laid down by these decisions, but he says: "These declarations of Gale are not statements as to what took place at the time the mortgage was made, but a statement made in reference to the very act he was performing for the bank, to-wit, valuing and inventory-

ing the goods." It is undoubtedly true that "whatever the agent does in the lawful prosecution of the business intrusted to him will bind his principal;" and the rule as announced by Mr. Justice STORY, that "when the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting a part of the *res gestæ*," is undoubtedly the correct one. But the premises of defendant's argument are at fault, for the acts of the agent Gale in and about which the declarations were claimed to have been made would have been as inadmissible as his declarations to prove that the prior mortgage was taken to defraud creditors. The agent had performed his duties as to the mortgage. He could neither by subsequent acts nor declarations be permitted to bind his principal, or in any manner affect the character of the work performed by him as agent. If it is true, as contended by defendant's counsel, that the declaration complained of had reference, not to the values fixed in the mortgage, but to the values fixed in the inventory, the result is the same; for the object and manifest effect of the declaration was to prove that because the agent, by fixing low values in a subsequent inventory, and by his admission made at that time, was then trying to prevent creditors from attaching, that such was his intention, and the intention of his principal, when the mortgage was made. Such evidence was not admissible. The intention might have been instantly formed by the agent, or conceived prior to the execution of the mortgage; but, in any event, the principal could be bound only by the intent of its agent, as manifested by his acts or declarations at the time of the execution of the mortgage itself. No subsequent isolated act, or declaration accompanying such act, could be offered to give color or effect to any act of the agent already performed and completed. Under no rule of evidence could the inventory about which the declaration is claimed to have been made, have been admitted to affect the mortgage already executed, if objected to. The ultimate fact offered to be proved was the value of the mortgaged property; and the proving of the fact that witness had, near the time of making the mortgage, assisted in making an inventory, could have no other purpose or relevancy than to show witness' knowledge of

the value of the property, and to assist in laying a foundation for his subsequent testimony as to what that value was. This declaration, instead of aiding, was rather calculated to destroy, the very foundation he was trying to lay. Again, upon defendant's own theory, the answer of the witness will not sustain defendant's argument. The witness says: "Gale said on *two different occasions* to me that he done that so parties would not attach." On both occasions the declaration could not have been of the *res gestæ* of the act. They were different occasions, and, so far as the answer discloses, neither occasion had reference to the act offered in evidence.

That the evidence may have been prejudicial to plaintiff is too plain for discussion. It was a declaration by the chief executive officer of the bank in reference to the very issue the jury were to try, and the charge of the court gave emphasis to this portion of the evidence, if there was not error in the instruction itself. The court said: "There was some evidence introduced here tending to show that this was a fraudulent transaction. If the evidence which has been introduced satisfies you that a fraud has been committed upon these creditors, Farwell & Co., with others, it is a fraud which was committed by Dean & Co. and the officers of the First National Bank. All this evidence you have the right to take into consideration in determining whether or not these instruments were executed for the purpose of defrauding creditors."

The court cannot say that the plaintiff was not prejudiced by the introduction of this evidence, and the judgment of the lower court must be reversed. All the justices concur.

REPORTER: — After the reversal of the judgment in this case the appellant served the respondent with a verified statement of its costs and disbursements on the appeal, together with a notice of the time and place of their adjustment before the clerk of the court. On the adjustment the clerk disallowed the two following items: "\$7 for making and serving case, over 50 folios; \$40.90 stenographer's fees to effect appeal record." From this action of the clerk the appellant appealed to the court. On this appeal, in addition to the record of the court, there was the certificate of the clerk "that the item of \$40.90 had been paid by the appellant to

the stenographer of the court below for a transcript of the proceedings. No question was made before me but that this item was a necessary expenditure, but it was contended that it was a cost of the court below, and not taxable here. The same was contended as to the item of \$7." It appeared from the record that a motion for a new trial "on the minutes of the court" had been denied, and that after this the bill of exceptions on which the case was reviewed in this court was prepared, served and settled.

*R. B. Tripp*, for appellant.

These costs and disbursements were necessarily incurred in order that the questions raised might be examined here. That both were taxable, see § 1, sub. 3, chap. 11, L. 1883, C. L., § 5187; § 4, chap. 52, L. 1879, C. L., § 484; *Schwalbach v. Chicago, M. & St. P. Ry. Co.*, 40 N. W. Rep. 579; *Bradford v. Vinton*, 27 id. 2; *French v. Fitch*, 35 id. 707; *Flood v. More*, 2 Abb. N. C. 91.

*C. B. Kennedy*, for respondent.

No brief on file.

By the COURT:

It is ordered and adjudged that the taxation of the costs in the above action by the clerk be and the same is hereby modified, and the items of \$7 and \$40.90 are hereby allowed in favor of the appellant in addition to the amount allowed by the clerk.

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SCHOOL DISTRICT No. 61, Respondent, v. ALDERSON, Appellant.

**1. Corporations — Existence — Estoppel.**

One having contracted with a corporation as such will not be permitted in an action on the contract to question its corporate existence.

**2. Contract — Validity—Compounding Felony—Nature of Proof.**

Where it is sought by parol to invalidate a written agreement on the ground of its having been made to compound a felony, such fact must be established with clearness and certainty. Its existence should be free from doubt. Mere threats of prosecution, whatever may have been their effect, are not sufficient so long as they were not coupled with expressions that would naturally lead the party to infer that if the contract was entered into no prosecution would follow.

**3. Same — Sufficiency of Proof—Question of Law.**

In such a case, where it appeared there was a deficit in the accounts of



a school-district treasurer, and there had been a contention between him and his successor with reference to it, and the latter stated he would settle the matter and stop the prosecution if the defaulting treasurer would pay a certain amount and give a note (the one in suit) signed by A., who testified he would not have signed the note if it had not been agreed to stop the prosecution, but it did not appear a criminal prosecution was referred to, or that one of any kind was pending; nor did it clearly appear what the terms of the agreement were; nor was it shown that the school district authorized the alleged unlawful agreement to be made, or that it had any knowledge thereof after accepting the note. *Held*, a verdict was properly directed in favor of the district in an action on the note.

(Argued May 18, 1888; affirmed May 25; opinion filed February 9, 1889.)

**A**PPEAL from the district court, Minnehaha county; Hon. C S. PALMER, Judge.

*H. H. Keith*, for appellant.

The court was not justified in directing the jury to find for the plaintiff.

The testimony given clearly shows that the defendant Collins, while acting as treasurer of plaintiff, embezzled about \$800 of its money, and the plaintiff, by its officers, threatened to arrest and prosecute him criminally therefor, and that the note in suit was signed by the defendant Alderson solely upon the agreement of the plaintiff and its officers that they would not prosecute Collins for the offense with which they charged him.

Any contract or agreement contemplating the discontinuance of a prosecution of one charged with the commission of a crime, or a forbearance to prosecute one for the same, is void. *Greenh. Pub. Pol.* 451-457; 2 *Rand. Com. Paper*, §§ 501, 502; *Bish. Cont.*, §§ 491-494; *Baker v. Farris*, 61 Mo. 389; *McMahon v. Smith*, 47 Conn. 221; *National Bank v. Kirk*, 90 Pa. St. 49; *Riddle v. Hall*, 99 id. 116; *Crowder v. Reed*, 80 Ind. 1; *Averbeck v. Hall*, 14 Bush, 505; *Peed v. McKee*, 42 Ia. 689; *Porter v. Havens*, 37 Barb. 343; *Conderman v. Trenchard*, 58 id. 165; *Snyder v. Willey*, 33 Mich. 484; *Wisner v. Bardwell*, 38 id. 278; *Buck v. First National Bank*, 27 id. 293; *Bell v. Administrators*, 1 Bay (S. C.), 249; *Hinesborough v. Summer*, 9 Vt. 23; *Laing v. McCall*, 50 id. 657; *Hinds v. Chamberlain*, 6 N. H. 225; *Clark v. Ricker*, 14 id. 44; *Henderson v. Palmer*, 71 Ill. 579; *Fernekes*



v. Bergenthal, 34 N. W. Rep. 238; Godwin v. Crowell, 56 Ga. 566; Haynes v. Rudd, 102 N. Y. 72, 7 N. E. Rep. 287.

It makes no difference that criminal proceedings had not been instituted at the time the note was given. Roll v. Raguet, 4 Ohio St. 400; Gardner v. Maxey, 9 B. Mon. 90; Von Windisch v. Klaus, 46 Conn. 433; Taylor v. Jaques, 106 Mass. 291; Baker v. Farris, 61 Mo. 389; Crowder v. Reed, 80 Ind. 1; National Bank v. Kirk, 90 Pa. St. 49.

Notwithstanding the note in suit was given for a portion of the money embezzled, still the defendant Alderson is not estopped from averring and proving that there was also a further consideration which was illegal and against public policy. 2 Rand. Com. Paper, § 502; Sumner v. Summers, 54 Mo. 340; Baker v. Farris, 61 id. 389; Van Windisch v. Klaus, 46 Conn. 433; McMahon v. Smith, 47 id. 221; Riddle v. Hall, 99 Pa. St. 116; Taylor v. Jaques, 106 Mass. 291; Peed v. McKee, 42 Ia. 689; Bowen v. Buck, 28 Vt. 308; Conderman v. Trenchard, 58 Barb. 165; Crowder v. Reed, 80 Ind. 1.

A part of the consideration being illegal renders the note void. 1 Pars. Cont. 456; Bish. Cont., § 487; Haynes v. Rudd, 103 N. Y. 272, 7 N. E. Rep. 287; Hinds v. Chamberlain, 6 N. H. 225; Wisner v. Bardwell, 38 Mich. 278; Snyder v. Willey, 33 id. 483; Averbek v. Hall, 14 Bush, 505.

It is not necessary in order to render the note invalid that there should be an express agreement to compound a crime. It is enough that it is understood that the accused is to derive some immunity from criminal responsibility, or some advantage in that regard, by the contract being made. Greenh. Pub. Pol. 453, 454; Conderman v. Trenchard, 53 Barb. 165; Porter v. Havens, 37 id. 343; Laing v. McCall, 50 Vt. 657; Riddle v. Hall, 99 Pa. St. 116; Sumner v. Summers, 54 Mo. 345.

Nor is it necessary that the promise to forbear from instituting criminal proceedings should have been made at the precise time the note was executed. It is enough if it appears that such promise was made at that time, or prior thereto, and that all parties acted in view of that promise, or that it was the inducement which operated upon the mind of the obligors. Kimbrough v. Lane, 11 Bush, 556.

The court should have directed a verdict for the defendant Alderson.

It was incumbent upon plaintiff to prove it was a corporation. There was no proof on that point.

*Wilkes & Wells*, for respondent.

The facts are not as contended. The consideration was the debt due from Collins to the district. The note was, therefore, valid. 1 Daniel, Neg. Inst. 198; Bibb v. Hitchcock, 20 Am. Rep. 288.

The plaintiff is a public corporation and has but few of the characteristics of private corporations. It is a mere agent of the territory for educational purposes. School District v. Fuess, 98 Pa. St. 600, 42 Am. Rep. 629; Dill. Mun. Corp., § 24; Sanborn v. School District, 12 Minn. 33 (Gil. 1); Beach v. Leahy, 11 Kan. 23; Commissioners v. Mighles, 7 Ohio St. 110.

This class of corporations is not subject to an indictment for such an offense as is alleged was committed. A corporation is incapable of committing a felony. 1 Whart. Cr. L., § 91; 1 Bish. Cr. Law, §§ 85-90.

That the court was right in directing the verdict, see Greenh. Pub. Pol. 458; Armstrong v. Express Co., 4 Baxter, 376; Swope v. Fire Ins. Co., 93 Pa. St. 251; Fulton v. Hood, 34 id. 365; Ward v. Allen, 2 Metc. 53; Marbury v. Brooks, 7 Wheat. 556; Hatch v. Collins, 34 Hun, 315.

Threats of unauthorized persons, whether officers of the respondent or not, cannot be considered as binding upon the district. Swope v. Jefferson Ins. Co., 93 Pa. St. 253; Fulton v. Hood, 34 id. 365. See, also, Hatch v. Collins, 14 Hun, 314; Bibb v. Hitchcock, 20 Am. Rep. 288; Catlin v. Henton, 9 Wis. 442; 2 Randolph, Commercial Paper, 85; Goodwin v. Crowell, 56 Ga. 566; Deere v. Wolfe, 21 N. W. Rep. 168; Plank v. Gunn, 2 Wood, 372; Taylor v. Cottrell, 16 Ill. 93.

The incorporation of respondent could not be inquired into collaterally in this suit. Dak. C. C., § 376; Eaton v. Aspinwall, 19 N. Y. 119; M. E. Church v. Pickett, id. 486; Stuart v. School District, 30 Mich. 69; 91 Ill. 179; Big. Estop. 527, 528; Whitford v. Laidler, 94 N. Y. 151; Swales v. State, 4 Ind. 516.

TRIPP, C. J. This is an action upon a promissory note made to the plaintiff by the defendants, Collins and Alderson, for the sum of \$150 and interest. The defendant Collins makes default. The defendant Alderson appears and answers, setting up three defenses: (1) He pleads a general denial. (2) He denies specially the incorporation of plaintiff. (3) He alleges that Collins, his co-defendant, was, during the years 1882, 1883, 1884, 1885, and a part of 1886, treasurer of plaintiff school district, and that as such treasurer he appropriated to his own use of the moneys of said district a sum exceeding \$800, and that the note in controversy was given in consideration of the agreement, on the part of the district and its officers, that they and all other persons should desist and refrain from prosecuting and punishing said Collins for the crime of embezzlement, and for no other and different consideration whatsoever.

At the close of the evidence on the part of the plaintiff and defendant, the court, on motion of plaintiff, directed a verdict in its favor for the amount of the note, and interest, to which the defendant Alderson duly excepted, and brings the case here for review upon the evidence.

Did the court err in directing a verdict for the plaintiff? The defendant rests his claim to have the case reversed upon two grounds: (1) That there was no evidence of plaintiff's incorporation; (2) that there was sufficient evidence of the illegal agreement entering into the consideration of the note to allow the case to be submitted to the jury.

We shall not stop to consider the first point made by appellant at length, as it was not seriously urged at the argument. Parties in private suits are not permitted to attack the incorporation of one with whom they have dealt in this collateral way. *Eaton v. Aspinwall*, 19 N. Y. 119; *Methodist Episcopal Church v. Pickett*, id. 482; *Stuart v. School Dist.*, 30 Mich. 69. But, having contracted with plaintiff as an incorporation, he is estopped to deny its capacity to so contract. *Whitford v. Laidler*, 94 N. Y. 151; *Cowell v. Springs Co.*, 100 U. S. 55.

Was the note void as against public policy?

Section 184, Pen. Code, reads as follows: "Every person who, having knowledge of the actual commission of a crime or viola-

tion of statute, takes any money or property of another, or any gratuity or reward, or any engagement or promise therefor, upon any agreement or understanding, express or implied, to compound or conceal such crime, or violation of statute, or to abstain from any prosecution therefor, or to withhold any evidence thereof, is punishable," etc. And a similar provision is contained in the Code of Criminal Procedure, § 235: "A person may be indicted for having, with the knowledge of the commission of a public offense, taken money or property of another, or a gratuity or reward, or an engagement or promise therefor, upon the agreement or understanding, express or implied, to compound or conceal the offense, or to abstain from a prosecution therefor, or to withhold any evidence thereof, though the person guilty of the original offense has not been indicted or tried." Certain misdemeanors may be compromised by consent of the injured party upon order of the court (§§ 524, 525, Code Crim. Proc.), but, except as therein provided, any agreement to conceal or compound an offense is a crime made punishable by fine or imprisonment, or both. And by section 953 of our Civil Code it is provided: A contract "is not lawful which is (1) contrary to an express provision of law; (2) contrary to the policy of express law, though not expressly prohibited; or (3) otherwise contrary to good morals." So that any contract or agreement, express or implied, to knowingly conceal or compound an offense, to abstain from prosecuting therefor, or to withhold any evidence thereof, is made unlawful by the express provision of our law.

A. G. Brown, the treasurer of plaintiff district, and successor of defendant Collins, was examined as a witness on the part of the defendant. There were also examined on the part of the defendant, George H. Brace, a banker, J. E. Colton, county superintendent of schools, and the defendant Alderson in his own behalf. The co-defendant, Collins, was not produced as a witness, nor were the other officers of the district, except the director Lowell, whose evidence was not abstracted by appellant. It appears from the abstract that the plaintiff school district, No. 61, was organized under the old school law of 1877; that the term of office of the defendant Collins expired in June, 1886; that upon the qualification of his successor it was discovered that Collins was behind in his

accounts. It does not clearly appear what was the amount of the deficit, but in the negotiations of settlement it was claimed to be in the neighborhood of \$800.

There was much contention, it seems, between Brown, the new treasurer, and Collins and his friends, as to the immediate settlement of this alleged shortage. Collins was behind. After several weeks of negotiation the difference was finally adjusted by allowing Collins to make payment to the district of \$200 cash, and to give his note, signed by Alderson, for \$150, the balance agreed upon between the parties. The note so given is the note in controversy.

We have examined this evidence with care, and are unable to extract from it any thing that could be construed into a contract or agreement on the part of plaintiff district, or any one pretending to represent it, that "it would desist or refrain from prosecuting the defendant Collins for the crime of embezzlement," or that "the note was given," in whole or in part, "to compound or settle" such crime, as alleged in the answer. The defendant Alderson testifies to some threats on the part of the treasurer, Brown, and there are vague statements running through the testimony of the witnesses that Brown said he would "stop the prosecution," and "would not prosecute him further," if Alderson would sign the note; and Alderson himself says, "I would not have signed it, [the note,] if he had not agreed to stop the prosecution;" but there is no statement any where by any of the witnesses that the "prosecution" referred to by the witnesses was a criminal prosecution, nor does it distinctly appear from the evidence what the terms of the agreement were, if such agreement was made. Mr. Brace, who makes many vague, indefinite references to the "threatened prosecution," and the "understanding" that "the prosecution would be stopped" if the note was given, when asked the direct question, "Was there any thing said by Mr. Brown in relation to the district prosecuting or not prosecuting Mr. Collins if this note was not given?" answered: "Mr. Brown stated that if he could get this settlement, they would settle all they claimed the district had against Mr. Collins, by the giving of this note and the money they received. They would settle the civil process of the district against Mr. Collins. The district never afterward proceeded

against Mr. Collins criminally, to my knowledge." Mr. Colton testifies to some "understanding" he had that the district officers were to take the money and note, and "leave matters just as they were; just stop further proceedings;" but he was not present at the settlement, and he testifies that "the most he knew was told him by the officers and those directly interested." Mr. Brown, the treasurer, and Mr. Lowell, the director, were both produced as witnesses, and not only denied that any agreement was made not to prosecute, but denied that any threats of prosecution were made.

In defenses of this kind, where it is sought to invalidate a written contract by parol evidence, it should be made to clearly appear that the agreement was in contravention of public policy. Vague and indefinite statements are not sufficient. The understanding or agreement relied on must be positive and certain; entered into and relied upon by both parties. Says Judge CALDWELL in *Swann v. Swann*, 21 Fed. Rep. 299: "No court ought to refuse its aid to enforce a contract on doubtful and uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled public policy of this state, or injurious to the morals of its people. Vague surmises and flippant assertions as to what is the public policy of the state, or what would be shocking to the moral sense of its people, are not to be indulged in." Says the Lord Chief Justice in *Walsh v. Fussell*, 6 Bing. 163: "To hold a contract void on the ground of its impolicy or inconvenience, we ought to be clearly satisfied that the performance of it would be necessarily attended with injury or inconvenience to the public." In *Malli v. Willett*, 57 Ia. 705, 11 N. W. Rep. 661, one witness, being asked what the consideration was, said that A. wanted to "prosecute" B. for adultery with his wife, and the note "was executed so as not to have any fuss with him about it,—to settle up that matter." The court held that the design to compound a criminal prosecution did not clearly appear; and that a verdict should have been for the plaintiffs. Says Chit. Cont. 664: "An agreement is not void on this ground, unless it expressly and unquestionably contravenes public policy, and be manifestly injurious to the interest of the state." Iowa likens it to declaring a law unconstitu-

tional and void. Says Judge COLLE in *Richmond v. Railway Co.*, 26 Ia. 202: "The power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power; and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt." In *Kellogg v. Larkin*, 3 Pin. 123, the court says: "Before a court should determine a contract which has been entered into in good faith, stipulating for nothing that is *malum in se*, \* \* \* to be void as contravening the policy of the state, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical. He is the safest magistrate who is more watchful over the rights of the individual than over the convenience of the public, as that is the best government which guards more vigilantly the freedom of the subject than the rights of the state."

The ambiguous and indefinite expressions in the testimony of the defendant Alderson as to "stopping the prosecution," etc., could not be permitted to go to the jury as evidence of an agreement to compound a felony. No "prosecution" of any kind had been commenced; and the word might have been understood and intended as applying to civil proceedings; and would be so construed by the court in absence of any evidence as to what was meant. It is very evident that some kind of proceeding would have been commenced if settlement had not been had; and if the statements of witnesses as to what was said are susceptible of any other construction than that which would make the contract void as against public policy it would be the duty of the court to adopt that construction. It is immaterial what may have been the expectations on the part of Collins when he gave this note, even if he expected it would prevent any criminal prosecution, so that there was no agreement, express or implied, on the part of the plaintiff to that effect. It is the promise or agreement to conceal or not to prosecute that invalidates and makes void the contract; and the mere fact that the contract "was made with the expectation that the prosecution would be dropped, does not take the case out of the rule." *Armstrong v. Express Co.*, 4 Baxt. 376; *Hoover v. Wood, McCahon*, 509; *Hatch v. Collins*, 34 Hnn, 314; *Marbury v. Brooks*, 7 Wheat. 556. Nor are threats of prosecu-



tion sufficient to avoid securities given in consequence thereof on the ground of being against public policy. The threats may be of such character as to avoid the contract as made *per minas*, but mere threats are not sufficient to avoid the contract on grounds of public policy, however violent they may be, or however much effect they may have upon the contracting party, so that they are not coupled with such words of expression as will naturally lead the party to infer that if the contract be made no prosecution will follow. In *Swope v. Insurance Co.*, 93 Pa. St. 251, the father had given his note and mortgage to secure certain sums of money alleged to have been embezzled by his son from the insurance company; and at the trial on foreclosure of the mortgage the father offered to prove that he at first declined to accede to the demand of the insurance company; that Coleman, agent of the company, exhibited a paper to him containing a statement of the sums alleged to have been embezzled, and said to him: "This is now \$1,300 that Albert has stolen, and I want to see if you are going to fix it up;" that he replied: "I am unable. I have no money, and cannot raise any;" that Coleman said: "Mortgage your property, and I'll have it taken by the company; and if you do not, we will have Albert arrested for his stealing, and put him in the penitentiary;" and that Coleman again said "that this stealing of Albert's had to be made up to the company, and if he did not come down immediately and give the mortgage spoken of, the company would at once arrest Albert, and put him in the penitentiary." The offer was rejected, and the verdict of the jury was directed for the insurance company. In reviewing the action of the lower court in directing the verdict, the supreme court says: "The offers were to prove threats of prosecution if the security was not given, and it is claimed that the jury might have inferred from this that if the mortgage was given the agreement was that no prosecution would ensue. But this would be unwarranted." The case is stronger than the one at bar. The threats were positive and continuous, and the inference is strong, from the language used, that if the security asked were given, no prosecution would follow; yet the court held that it was not, within the rule of contracts, void as against public policy. In *Catlin v. Henton*, 9 Wis. 477, the father had given a note and mortgage for certain sums



alleged to have been stolen by his son from the money-drawer of his employer ; and both the father and son testified at the trial " that the mortgage was executed on the demand of Lyman by David P. Mapes, the father of Timothy, to avoid such criminal prosecution, and under an agreement with Lyman that, if it was given, the prosecution should be hushed up." But the court sustained the contract, and the supreme court, in sustaining the findings of the lower court, says of this defense : " True, it is supported by the two Mapes, but the testimony of Lyman and the other witnesses quite overbalances theirs, and satisfies us that the note and mortgage were executed by them to secure an amount which they knew and felt that Timothy ought to pay." In Massachusetts it is held that where the illegal promise is made, not from motives of gain, but from sympathy and compassion the contract is valid. *Com. v. Pease*, 16 Mass. 94 ; *Ward v. Allen*, 2 Metc. 53.

These cases illustrate how strictly the rule is held to agreements to conceal crime and prevent public prosecution. It is true that where, in the greed for gain, the party agrees, as a part of the consideration of the contract, to suppress public prosecution of crime, the entire contract is as much tainted, and is equally vitiated, as against public policy, as though such corrupt agreement formed the sole consideration of the offense. § 909, Civil Code ; *Haynes v. Rudd*, 102 N. Y. 372, 7 N. E. Rep. 287 ; *Wiener v. Bardwell*, 38 Mich. 278. But it must clearly appear, where other considerations apparently or necessarily enter into the contract, that the contract was in part based upon the illegal consideration ; and it is incumbent upon the party who alleges such illegal consideration to prove it. The burden is upon him to overcome all fair presumptions arising from the evidence in favor of the legality of the contract.

There is another question involved in this case that cannot be overlooked by the court in determining the validity of this contract, and the correctness of the ruling of the court in directing the verdict of the jury. The plaintiff is a school district. It was one of the contracting parties, and the party who is charged with an act which, if done by an individual, would subject him to fine and imprisonment. It is nowhere claimed that the corrupt agreement was made with the plaintiff acting in its collective ca-

capacity when assembled in district meeting. It is not claimed that it was made by its school board when assembled in regular session, but it is claimed to have been made by the succeeding treasurer with an ex-treasurer of the district.

A school district is at most an involuntary *quasi* corporation. It has no voice in its own creation. It is called into being and struck out of existence at the will and dictation of the county superintendent and the county board. Its directors and agents have the honors of office thrust upon them without solicitation, and without compensation. These school districts are mere subdivisions of the county, temporarily segregated and set apart with certain powers, only expressly granted by crude statutes subject to ever-varying modifications and amendments by hasty and inconsistent legislation. Judge BELL, in *Harris v. School Dist.*, 8 Fost. (N. H.) 58, well expresses it when he says: "These little corporations have sprung into existence within a few years, \* \* \* and their corporate powers and those of their officers are to be settled by the constructions of the courts upon a succession of crude, unconnected and often experimental enactments." Such corporations have no powers derived from usage. They have the powers only expressly granted to them, and such as are necessarily implied from the powers granted to enable them to perform the duties imposed by law, and no more. Most of the powers allowed to be exercised by the school districts are conferred upon the voters assembled in district meeting. Other minor powers are conferred upon the school board, consisting of a director, treasurer and clerk, and certain enumerated ministerial duties are required to be performed by the officers individually; but by no provision of the statute is the treasurer authorized to compromise and settle claims against the district nor *a fortiori* to enter into contracts in violation of law. If the treasurer of the plaintiff school district was authorized to settle and compromise the claim against the outgoing treasurer by express authority given or by ratification of his acts, it would not be liable for his willful torts committed in excess of his authority, and done without its knowledge or consent. The agent of a private person or private corporation may bind his principal by his own wrongful acts done in the course of and within the scope of his employment; but the rule is relaxed in case of

public corporations. Says the court in *School Dist. v. Fuess*, 98 Pa. St. 600: "A less stringent rule applies to public corporations, and least stringent of all should be applied to school districts whose officers have limited and defined powers in a system exclusively for the free education of the children in the commonwealth. The directors as a board must exercise their powers. The board may make contracts. \* \* \* One or more of the directors, without authority from the board, can make no contract binding upon the district,— cannot change a contract,— can do no act fixing the district for a liability." See, also, *Sandborn v. School District*, 12 Minn. 33 (Gil. 1); *Beach v. Leahy*, 11 Kan. 23; *Commissioners v. Mighels*, 7 Ohio St. 110.

The rule in case of individuals and private corporations, however, extends no further than to wrongs committed in the course and within the scope of employment; it does not extend to fraud and willful torts, committed by the agent outside of and not within the scope of his employment. There was no evidence in this case that the treasurer had ever been authorized to compromise or settle this claim by the district. On the contrary, it does appear from the defendant's own testimony that nothing was done by the district in reference to this matter, though they had several meetings during that time. The most that appears in the evidence of any action on the part of the district appears in the defendant's reply to the question of the court: "*Question.* Did you ask them to come to a meeting when you went around to see them? *Answer.* Well, I asked them to get together, sir; to see what they would do. There was nothing done definite about that proposition at all." If the district was ever bound by the treasurer's action, it was by receiving the fruits of his settlement, to-wit, the note, and thereby ratifying his unlawful contract not to prosecute; but in such case it is necessary, in order to bind private individuals even by ratification, that they have knowledge of the wrong committed by their agents. Our statute provides (§ 1349, Civil Code): "A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or, where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof." And this court, in *Nichols v. Bruns*, 5 Dak. 28, 37 N. W. Rep. 752 (May

Term, 1887), held that a principal was not liable for the fraudulent representations of his agent on the ground of ratification where he received the fruits of the contract without knowledge of any wrong committed. If such be the rule in case of an individual or private corporation, so much the more ought a school district not to be liable for an act of its officer, done without its authority, and ratified only so far as to receive and adopt the results of his acts, but without knowledge that in doing the act ratified he had exceeded his authority, or agreed to do what was forbidden by law.

These *quasi* public corporations are not liable for the neglect or wrongful acts of their officers, unless such liability arises out of some special provision of statute. Cities are held liable for negligence in case of their streets, etc., by virtue of the special charters creating them; but this rule is held not to extend to counties, towns, and similar *quasi* corporations. See authorities cited by 2 Dill. Mun. Corp., § 963; Hill v. Boston, 122 Mass. 344. Private corporations have been held for libel when they have authorized reports of their officers, reflecting upon the business and standing of rival companies. Whitfield v. Railroad Co., El., Bl. & El. 115; Railroad Co. v. Quigley, 21 How. 202; Maynard v. Insurance Co., 34 Cal. 48; Aldrich v. Printing Co., 9 Minn. 133 (Gil. 123). "But," says Judge COOLEY, commenting on these cases, "if, on the other hand, some servant of the corporation, who supposed he might advance its interests by decrying the business of a rival, were to proceed to do so by communications in the daily press, it is plain that these, though having in view the same purpose which the publication by the official board was meant to accomplish, can in no sense be regarded as corporate acts. They have not the corporate authorization; they are not made within the apparent scope of the servant's duty; and the tort is consequently an individual tort, purely and solely, and redress must be sought accordingly." Cooley, Torts, 121. ERLE, C. J., in Green v. Omnibus Co., 7 C. B. (N. S.) 302, says: "I take the whole tenor of the authorities to show that an action for a wrong done lies against a corporation when the act of the corporation — the thing done — is within the purpose of the corporation, and it has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual."

What has been quoted from Judges COOLEY and ERLE was said in reference to private corporations. The rule as there announced would of course be relaxed, as applied to *quasi* public corporations; but if the rule applicable to private corporations were held to obtain here, this plaintiff, on the evidence, ought not to be bound by the representations or unauthorized agreements of its treasurer. It was not presumably a contract he had a right to make, not one presumably within the scope of his duty as treasurer. The defendant was bound to take notice of the powers and authority of the treasurer. He was not authorized to presume that the treasurer had any authority to individually act for this district; certainly he was not authorized to presume that the treasurer had authority to make an illegal contract. The treasurer could only speak as a private citizen, in absence of any authority conferred upon him by the district meeting or the district board. He was in no position to influence or control public prosecutions. He was not district attorney, a magistrate, nor in any way connected with the prosecution of public offenders. No prosecution had been commenced; and if there had, and he had been shown to have made such corrupt agreement, it was necessary to go further, and connect the district with it, either by previous authority conferred, or subsequent ratification of his acts with knowledge of the fact. A whole class of people cannot be wronged and deprived of their property by the over-officious acts of a zealous self-constituted agent, acting without authority, and in a manner not authorized by law. If such were the rule, there would be no safety in our republican form of government, where all acts must be performed by agents. The wholesome and safe rule is that all parties dealing with these public officers must see to it that they are authorized to make the contract entered into, and to hold them and all persons who contract with such officers to a rigid and strict accountability for their public acts.

We are clearly of the opinion, from a careful examination of this case :

1. That no corrupt agreement was shown to have been made with the treasurer Brown which would make the contract void as against public policy.

2. That there is not shown any authorization or ratification on

the part of the district which would bind it, if such agreement were found to have been made.

The case is affirmed. All the justices concur, except CARLAND, J., who concurs upon the last point.

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**GULL RIVER LUMBER Co., Respondent, v. KEEFE ET AL., Appellants.**

**1. Mechanics' Liens — Jury Trial.**

Section 236, C. C. Pro., as amended by chap. 146, L. 1885, providing: "An issue of law must be tried by the court. \* \* \* An issue of fact for the recovery of money only, or specific, real or personal property, must be tried by a jury, unless a jury trial be waived. \* \* \* Every other issue is liable by the court, which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it,"— does not give a right of jury trial in an action to foreclose a mechanic's lien. Such an action being equitable in its nature, and there being no right of trial by jury under this statute, the constitution, or any law of the United States, it was not error to refuse it.

**2. Corporations, Foreign — Right to Sue — How Raised.**

The defense that a foreign corporation has no authority to sue must be raised by answer. A denial of an allegation of the complaint that "it was authorized to transact business in the territory" does not raise an issue of fact, nor does an answer alleging merely legal conclusions even though there is a voluntary reply supplying the omissions, but not considered by the court, for a record would not be presented that could be considered by the appellate court.

**3. Estoppel, Equitable — Sufficiency of Facts.**

On an issue of equitable estoppel in an action to foreclose a mechanic's lien, arising between a sub-contractor, the plaintiff, and the owner of the premises, it appeared the sub-contractor's agent, on the owner's inquiry, said the contractors were not owing the plaintiff to any great amount, that they were straightforward and all right. It also appeared the purpose of the inquiry was not disclosed. The agent's statements were made away from the office and the books were not accessible. There appeared no design to in any way mislead the defendant, nor did the facts show any gross negligence on the part of the agent in making the statements. *Held*, assuming it to be a case where an agent could estop his principal, the facts would not warrant an estoppel.

(Argued Feb. 21, 1888; affirmed Feb. 24; opinion filed Feb. 14, 1889.)

**A** PPEAL from the district court, Burleigh county; Hon. W. H. FRANCIS, Judge.

*Winchester & Hanitch*, for appellant.

An action to foreclose a mechanic's lien is an action at law.

*Marsh v. Fraser*, 27 Wis. 596; *Hall v. Hinckley*, 32 id. 362; *Willer v. Bergenthal*, 50 id. 474, 7 N. W. Rep. 352; *State v. Eads*, 15 Ia. 117; *Cole v. Colby*, 57 N. H. 100. The complaint states a legal cause of action, asks a personal judgment and such judgment was rendered. Defendant was entitled to a jury trial. *Pomeroy*, Rem. (2d ed.) 86.

The question presented is, can a foreign corporation, without complying with our laws as to such corporations, acquire a mechanic's lien upon the property of one with whom it sustained no contractual relation? The state has the right to condition the rights of such corporations. *Bank v. Earle*, 13 Pet. 519; *Paul v. Virginia*, 8 Wall. 168; *Ducat v. Chicago*, 10 id. 410; *Doyle v. Cont. Ins. Co.*, 94 U. S. 535; *Canada C. R. R. Co. v. Gebhard*, 109 id. 537, 3 Sup. Ct. Rep. 363; *Cooper M. Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. Rep. 739. Plaintiff to have been entitled to any relief, ought to have complied with our laws. *Williams v. Cheney*, 3 Gray, 215, 501; *Ætna Ins. Co. v. Harbey*, 13 Wis. 395; *New Hope D. B. Co. v. P. S. Co.*, 25 Wend. 648; *Thorn v. Travelers' Ins. Co.*, 80 Pa. St. 27; *Buxten v. Hamblen*, 32 Me. 448; *Cin. M. H. A. Co. v. Rosental*, 55 Ill. 85; *In re Comstock*, 3 Sawy. 218.

The plaintiff is estopped to enforce the lien it claims. There is no substantial conflict in the evidence; but if the court should find there was, the rule announced in *Canfield v. Bogle*, 2 Dak. 464, would not obtain, because the evidence was taken before a referee and this court is in the same position as the court below. *Wilson v. Cross*, 33 Cal. 61; *Lander v. Beers*, 48 id. 536, 547; *Canning v. C. P. R. R. Co.*, 50 id. 168. The statements made by plaintiff's agent waived the lien. *Parliman v. Young*, 2 Dak. 165; *Brown v. Bowen*, 30 N. Y. 541; *Bigelow*, 495; *Bates v. Le Clair*, 49 Vt. 234; *Marston v. Heffer*, 63 Ill. 403; *Payne v. Burnham*, 62 N. Y. 73; *Newman v. Muller*, 20 N. W. Rep. 845; *Eikenberry v. Edwards*, 24 id. 571; *Sessions v. Rice*, 30 id. 735; *Ward v. Berkshire L. Ins. Co.*, 9 N. E. Rep. 363; *Kelley v. Fiske*, 11 id. 445.

*J. E. Carland*, for respondent.

An action to foreclose a mechanic's lien under our statute is



not an action at law — one for money only. A relief summons is required and the whole proceeding is equitable. While a personal judgment is sometimes rendered that is incidental merely.

The plaintiff had complied with our laws with reference to foreign corporations. If it had not done so it could maintain this suit. *American B. Co. v. Moore*, 2 Dak. 280; *Fuller & J. M. Co. v. Foster*, 30 N. W. Rep. 166; *Cooper M. Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. Rep. 739.

The court would not be authorized in holding that the plaintiff was estopped from asserting its lien. 2 *Herman*, 742; *Brandt v. Virginia C. & I. Co.*, 93 U. S. 336; *Henshaw v. Bissell*, 18 Wall. 225; *Sutton v. Wood*, 27 Minn. 362, 7 N. W. Rep. 365; *Combs v. Cooper*, 5 Minn. 200 (Gil. 200); *Whiteacre v. Culver*, 6 id. 297 (Gil. 203); *Coldman v. Pierce*, 26 Minn. 123, 1 N. W. Rep. 846.

TRIPP, C. J. This was an action brought in the district court of Burleigh county to enforce a mechanic's lien by the plaintiff as a sub-contractor. The defendants Keefe, Hackett and Stewart are joined as contractors, and Ward as the owner of the building against which the lien is sought to be enforced. Ward alone answers. The case was sent to a referee against the objection of the defendant, and, the referee having reported the evidence to the court, it made findings thereon in favor of the plaintiff, and directed a judgment to be entered, in accordance with such findings, for the amount of the plaintiff's claim, and a foreclosure of the lien to satisfy such judgment.

Three alleged errors of the court below are relied upon by the appellant to reverse the case here:

(1) That the lower court erred in sending the case to a referee over the objection of defendant.

(2) That plaintiff had not complied with the statute relating to foreign corporations, and had no authority to sue.

(3) That the plaintiff was estopped from maintaining this action, in that, on application by defendant Ward, its agent had informed him that the contractors, Keefe and others, had paid the indebtedness due for lumber used in the erection of his house, and that he, relying upon such information, had paid said contractors



a large portion of the indebtedness due them, and had failed to secure himself for the further performance of said contract.

We shall examine the alleged errors in the order of their assignment.

The record shows that the lower court treated the action as one in which it had the power to make a compulsory reference. The defendant contends that he was entitled to a trial by jury, and has been deprived of a right under the laws of the territory and constitution of the United States. Section 236, Code Civil Proc., as amended by chapter 146, Laws 1885, provides: "An issue of fact for the recovery of money only, or of specific real or personal property, must be tried by a jury, unless a jury trial be waived. \* \* \* Every other issue is triable by the court, which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it."

This action is a statutory one, purely in the nature of an equitable proceeding, to enforce a statutory lien. It is not an action for the recovery of money only. The summons is one for relief. Judgment cannot be taken by default without proof of the allegations of the complaint. It is clearly one of the "other issues" triable by the court. Appellant was not, then, entitled to a trial by jury under this statute. If the statute is a valid one, the issue was triable by the court, who may either try the issues itself, or send them, or any of them, to a referee or jury, as it may elect. Here it sent the cause to a referee to report the evidence, upon which it itself determined the case.

Defendant contends that under article 7 of the amendment to the constitution he is entitled to a trial by jury. This amendment, and all preceding amendments, have been uniformly held to be limitations upon the powers of congress granted to it by the states, and as such would, of course, be limitations upon the legislative powers of the territory. The territory, as the creature of congress, could exercise no greater powers than were possessed by its creator; and if congress could not pass such a law, under which the defendant would be deprived of a right to jury trial, the territory could not, and it would be void.

The amendment provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of

trial by jury shall be preserved." Suits at "common law" are so well understood by the profession that an attempted definition would seem pedantic. "Common-law actions" and "suits in equity" and "admiralty" are carefully distinguished throughout the sections and amendments of the constitution, and the forms and modes of procedure formerly were as distinct and separate as the principles governing them have ever continued to be. It is a sufficient answer to this objection to say that this is not an "action at common law." No such proceeding was ever known or obtained at common law, but every attempted enforcement of liens, whether existing by common law or under earlier statutes, in absence of express statutory proceedings, was had in equity. Under our modern system of jurisprudence, where the forms of actions have been blended, the same equitable principles must govern and control the rights of parties outside of the mere form of procedure. Trial by jury is a matter of right, and not of procedure; it belongs to the common law, and not to the equity side of the court. This being a statutory action in the nature of an equitable proceeding, the defendant had no right under the statute, the constitution, or any law of the United States, to demand a jury trial, and the court did not err in sending the facts to a referee.

The mere fact that a personal judgment is permitted to be rendered in such cases does not change or affect the character of the action. As stated by the court in *Davis v. Alvord*, 94 U. S. 546, where it was sought to dismiss the appeal upon the ground that the action, which was one brought to enforce a mechanic's and laborer's lien under the statute, was an action at law, and should have been brought up on error: "The fact that, according to the modes of procedure adopted in the territory, a personal judgment for the amount found due is usually rendered in such cases, with directions that, if the same be not satisfied out of other property of the debtor, the property upon which the lien is adjudged to exist shall be sold, and the proceeds be applied to its payment, does not change the character of the suit from one of equitable cognizance, and convert it into an action at law."

The second objection, that the plaintiff had no authority to sue, is not properly before this court. This court has held that such

a defense must be taken advantage of by answer. That the plaintiff has complied with the statutes relating to foreign corporations need not be alleged in the complaint, and a failure to make such an allegation does not make the complaint open to demurrer. The plaintiff, it is true, in its complaint does allege that "it was during all of the time hereinafter mentioned a corporation created and existing under the laws of the state of Minnesota, and authorized to transact business in the territory of Dakota." And the defendant denies this in his answer, but it is the denial of a mere legal conclusion of the pleader, and created no issue of fact upon which evidence was admissible. The defendant, however, does attempt to raise the issue in his answer by way of new matter, as follows: "That the above-named plaintiff has never filed nor had recorded a duly-authenticated copy of the appointment or commission of any agent, appointed by said plaintiff, residing at some accessible point in this territory, in the county where the principal business of said plaintiff has been carried on, duly authorized to accept service of process, and upon whom service of process might have been made in any action in which said plaintiff might have been a party, and service upon such agent might have been taken and held as due service upon said plaintiff in the office of the register of deeds of the county where such an agent should have resided." A mere inspection of the pleading will make it evident that no allegation of fact is set forth which could be put in issue by a denial. It does not allege that plaintiff had not filed a copy of his appointment, but alleges it had not filed a duly-authenticated copy; a duly-authenticated copy of the appointment of any agent appointed by said plaintiff; a duly-authenticated copy of the appointment of any agent appointed by said plaintiff, residing at some accessible point in this territory; a duly-authenticated copy of the appointment of any agent appointed by said plaintiff residing at some accessible point in this territory, in the county where the principal business of said plaintiff has been carried on; a duly-authenticated copy of the appointment of any agent appointed by said plaintiff, residing at some accessible point in this territory, in the county where the principal business of said plaintiff has been carried on, duly authorized to accept service of process, and upon whom service of process might have been made in any action in

which said plaintiff might have been a party, and service upon such agent might have been taken and held as due service upon said plaintiff; a duly-authenticated copy of the appointment of any agent appointed by said plaintiff residing at some accessible point in this territory, in the county where the principal business of said plaintiff has been carried on, duly authorized to accept service of process, and upon whom service of process might have been made in any action in which said plaintiff might have been a party, and service upon such agent might have been taken and held as service upon said plaintiff in the office of the register of deeds in the county where such an agent should have resided.

It is impossible, upon an analysis of this pleading, to determine in what respect the plaintiff had failed to comply with the statute,—whether the copy of the appointment was not “duly authenticated,” the agent had not been “appointed by the plaintiff,” the agent did not reside at “some accessible point,” or the agent did not reside where the “principal business of plaintiff was carried on,” or whether he meant to allege that the agent was not “duly authorized to accept service.” The pleading is not merely indefinite. It pleads, at best, a mere legal conclusion. Whether the copy of the appointment was “duly authenticated,” or the agent was “duly authorized to accept service of process,” are questions for the court. The pleader might, with equal propriety, have alleged that the plaintiff did not in his appointment of agent comply with the requirements of the statute; that is the effect of the allegation in which he has copied the language of the section into an attempted allegation of fact. The plaintiff, perhaps, came near supplying the omission of defendant by gratuitously replying, and in setting up certain allegations of fact in reference to appointment of an agent and filing a copy thereof. The reply, however, while contained in the record, cannot be considered by the court in absence of any order made, or apparent consideration thereof made, by the court. Our statute makes no provision for a reply made voluntarily by the plaintiff. It makes provision for a reply only to a counter-claim. The answer here sets up no counter-claim. It was new matter, and could be replied to only upon order of the court made upon application of the defendant. It often occurs

that a defendant, having alleged new matter, as, for instance, the statute of limitations, desires to know what defense the plaintiff will make to it upon the trial ; whether he will claim a subsequent promise, etc. In such case, he may apply to the court for an order compelling the plaintiff to reply ; and, in absence of such application, the plaintiff may interpose any defense he may have to the plea, but he cannot voluntarily, nor upon his own application to the court, interpose a reply. Such application must come from the defendant only. A reply, then, voluntarily interposed, will be disregarded by the court. §§ 122-124, Code Civil Proc. The issues under our Code are limited to the complaint, answer, voluntary replies to counter-claims, and replies to new matter put in upon order of the court upon application of the defendant. Again, a careful examination of the entire abstract fails to disclose any evidence whatever that the plaintiff ever transacted any business within the Territory of Dakota. All the lumber may have been sold without the Territory of Dakota, so far as is disclosed by the abstract. Nor is there any evidence whatever that the agent failed in any respect to comply with the statute relating to foreign corporations, if any thing in this case was required to be shown. There is an entire absence of any thing in the abstract, as presented to this court, that would warrant an examination of the question sought to be raised.

*Third.* The defendant seeks to set up an equitable estoppel against the plaintiff, based upon certain conversations had with its agent as to the amount of Keefe's and others' indebtedness. Without stopping to consider whether this is a case in which the agent of a corporation can estop its principal by language used, not in the performance strictly of any duties imposed upon him by the terms of his employment, we are of the opinion that the language relied upon does not, under the circumstances, make a case of estoppel. The conversation with plaintiff's agent is set out in full in the record. The defendant claims that he went to the office of Weaver, an alleged agent of the plaintiff, and found him out ; that upon inquiry he found Weaver at the office of one Winchester, one of the attorneys of the defendant ; and, in his own language : " I asked him if Hackett, Keefe & Stewart were not paying their bills. He looked up,—he was writing at the

time. He looked up and said he guessed they was. He looked as though he wondered why I inquired. I told him that I heard that Hackett, Keefe & Stewart were not paying their bills on my house, and that I had come in to see about it. I asked him if they were owing him any amount, and he told me that they were not owing him any thing of any account, and that they were all right." And on cross-examination he testified: "*Question*. Didn't he say to you then that he did not remember without looking in the books what their account was? *Answer*. I think he said something that he could not tell exactly. I do not remember about his mentioning books at all; but he did say that they were not owing him any thing of any account. *Q*. Did he tell you at all that he was not able to tell you what they were owing him from memory? *A*. That was about the amount of the conversation." Mr. Winchester also corroborated Mr. Ward. Mr. Weaver, on the other hand, testified that he may have told him that his impression was that it was not a very large amount, but that he also told him that he did not remember, as he did not carry his books in his head; and that there was no conversation, to his remembrance, as to why defendant wanted to know, or about indebtedness for lumber for defendant's building; that he considered them straightforward boys, etc.; but that nothing was said to him by defendant about his not wanting to pay them money until he found out how much they owed plaintiff. The testimony further disclosed that the defendant had taken a bond from the contractors in the sum of \$2,450 for the faithful performance of the contract, though defendant says he had been informed that the bond was not very good. It was further disclosed by the evidence that a large part of plaintiff's indebtedness — nearly one-half — was incurred after this conversation with Weaver. As to such indebtedness the plaintiff could not be estopped by the prior act of its agent; but we are unable to discover any fraud or willful misrepresentation on the part of Weaver, or such gross negligence, its equivalent, as would estop the plaintiff. Weaver was not at his own office, where he had ready access to the books, — a fact well known to defendant. His answer must be from memory. His mind was evidently on other matters, foreign to the question propounded by defendant. No reason is urged or shown

why he should desire to mislead defendant to his injury. If he answered defendant, as defendant claims he did, he was evidently honestly mistaken, and, if so, the one essential element of fraud is lacking. All the essential elements of estoppel must be clearly proved, and "the evidence should be precise, clear and unequivocal." Herm. Estop. 742. Justice FIELD, in *Brant v. Coal Co.*, 93 U. S. 335, in applying the doctrine of equitable estoppel, says: "For the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury." Story says: "In all this class of cases, the doctrine proceeds upon the ground of constructive fraud, or of gross negligence, which in effect implies fraud; and therefore, where the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has accordingly been laid down by a very learned judge that the cases on this subject go to this result only, that there must be positive fraud or concealment, or negligence so gross as to amount to constructive fraud." 1 Story, Eq. Jur., § 391. The cases say: "The element of fraud is essential, either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up." See *Hill v. Epley*, 31 Pa. St. 334; *Henshaw v. Bissell*, 18 Wall. 271; *Biddle Boggs v. Mining Co.*, 14 Cal. 368; *Com. v. Moltz*, 10 Pa. St. 531; *Copeland v. Copeland*, 28 Me. 539; *Delaplaine v. Hitchcock*, 6 Hill, 616; *Zuchtman v. Roberts*, 109 Mass. 53.

Giving to the evidence of defendant its strongest meaning, a court would not be warranted in holding it to constitute an estoppel; and, the court having found upon the evidence in favor of the plaintiff, we cannot disturb the finding. The judgment is affirmed; all the justices concurring.



MURRY, Respondent, *v.* BURRIS ET AL., Appellants.

**1. Forcible Entry and Detainer — Statute—Construction —Character of Possession.**

The design of the forcible entry and detainer statute is to furnish one entitled to the possession of land a summary remedy to recover the same as against a mere trespasser or intruder. In such action the defendant may show the character of the plaintiff's possession on which a recovery is sought, also the character of his own right to the premises in controversy. While the language of the statute gives a right of action for a wrongful entry upon another's actual possession, it must not be construed to mean a possession obtained by force, and so held against the rightful claimant, nor is a mere "scrambling" possession as against him sufficient to maintain the action.

**2. Justices of the Peace—Jurisdiction—Actions Involving Title.**

In an action in a justice's court the defendant interposed an answer raising an issue of title and offered proof under it. Sections 10, 37, Justices' Code, provide that when the title or boundaries of real property in any wise come in question the case shall be certified to the district court. *Held*, upon the offer of proof the jurisdiction of the justice ceased and the judgment afterward rendered was void.

**3. Same — Appeal — Effect.**

That appealing in such a case is in effect certifying the case to the district court, as applied to the latter's jurisdiction,—doubted.

(Argued October 10, 1888; reversed October 13; opinion filed February 12, 1889.)

**A** PPEAL from the district court, Lawrence county; Hon. C. M. THOMAS, Judge.

*McLaughlin & Steele*, for appellants.

Plaintiff's entry was unlawful from the beginning. 3 Blackst. 171. The owner of land, wrongfully kept out of possession, may, if he can, regain and maintain his possession. *McDougal v. Sitcher*, 1 Johns. 42; *Hyatt v. Wood*, id. 157, 158; *Ives v. Ives*, 13 id. 235; *Smith v. Burtis*, 6 id. 218; *Jackson v. Farmer*, 9 Wend. 201, 203; *Warren v. Warren*, 17 id. 257; *Parsons v. Brown*, 15 Barb. 590; *Gyre v. Culver*, 47 id. 592; *Sage v. Harpending*, 49 id. 175; *Wood v. Phillips*, 43 N. Y. 152; *Bliss v. Johnson*, 73 id. 529; *Tribble v. Frame*, 7 J. J. Marsh. 599, 23 Am. Dec. 439; *Com. v. Dudley*, 10 Mass. 409; *Pennsylvania v. Robinson*, Addis. 14, 17; *LaFrombois v. Jackson*, 8 Cow. 603; *Orser v. Storms*, 9 id. 687; *Langton v. Potter*, 3 Mass. 215; 4 Kent\* (12th ed.), notes c and 1.



This being the law, the court erred in its rulings upon the evidence. Further, it was proper to show the character of Murry's possession and O'Neill's prior peaceable possession. 3 Blackst. 176. Title and right of possession is a legitimate subject of inquiry in this action. These statutes are intended to prevent the use of force and violence, not a party's regaining his property in a peaceable manner. Restoration cannot be had by an intruder as against the lawful owner. *People v. Field*, 52 Barb. 211, 1 Lans. 232. The owner had the right to repossess himself of his property. *Langdon v. Potter*, 3 Mass. 215; *Hyatt v. Wood*, 4 Johns. 158; *Orser v. Storms*, 9 Cow. 683; *Livingston v. Tanner*, 14 N. Y. 64; *Newton v. Harland*, 1 Mann. & Gr. 644; 4 Kent Com. 118 (12th ed.), notes *c* and 1; *People v. Field*, 1 Lans. 239, 240.

In the absence of the occupant, the owner having the right of possession, may enter by forcing open the door, though the occupant expects to return. *Mussey v. Scott*, 32 Vt. 82; *People v. Field*, *supra*; 2 Wat. Tresp., §§ 1171-1173; 17 Wend. 263; *Hoffman v. Harrington*, 22 Mich. 52; 2 Starkie, Ev. 330. Plaintiff must show possession or a right to it. *Yorgensen v. Yorgensen*, 6 Neb. 383; *Houghtailing v. Houghtaling*, 56 Barb. 194. There was error in rejecting the lease and deed. *Thompson v. Smith*, 28 Cal. 532; *Dickenson v. Maguire*, 9 id. 49; *Shelby v. Houston*, 38 id. 422.

*Martin & Mason* and *Van Cise*, for respondent.

This controversy turns upon the construction to be given to the forcible entry and detainer statute. Appellants contend its effect is none other than the common-law criminal proceeding. That the possession and force contemplated is personal. Under this and other modern statutes the possession may be evidenced by inclosures, buildings and such acts of occupancy as are usually exercised, and the force need not be personal, but such as tearing down fences, entering houses, by breaking windows, or forcing doors, or even possession obtained by fraud or stealth. Proof of prior possession constitutes no defense. *Brown v. Berry*, 39 Cal. 23; *Langworthy v. Myers*, 4 Ia. 18. The case of *Bowers v. Cherokee*, 45 Cal. 495, under that particular statute, is not in conflict with this rule. Title and right of possession is in no way

involved in this action. *Stephens v. McCloy*, 36 Ia. 659; *Emsley v. Bennett*, 37 id. 15; *Settle v. Henson*, *Morris*, 111; *Lorimier v. Lewis*, id. 253; *Allen v. Tobias*, 77 Ill. 169; *Jarvis v. Hamilton*, 19 Wis. 205; *Newton v. Leavy*, 25 N. W. Rep. 39; *R. R. Co. v. Johnson*, 7 Sup. Ct. Rep. 340; *Myers v. Koenig*, 5 Neb. 419; *Estabrook v. Hateroth*, 34 N. W. Rep. 634; *Campbell v. Coonradt*, 22 Kan. 707; *Miller v. Tillman*, 61 Mo. 316; *Dilworth v. Fee*, 52 id. 130-133; *Emerson v. Sturgeon*, 59 id. 404-406. If the party guilty of forcible entry has title or right of possession, he must deliver up the possession forcibly acquired, and then litigate his title or right of possession in a proper action. *Mitchell v. Davis*, 23 Cal. 381; *Brown v. Perry*, 39 id. 24.

TRIPP, C. J. This is an action of forcible entry and detention brought to recover possession of a quarter section of land with the buildings and improvements thereon, situated in the county of Lawrence, Dakota.

The complaint contains two causes of action, or states its cause of action in two counts. In the first, plaintiff alleges an unlawful entry by force and violence, and an unlawful entry by fraud and stealth, with unlawful detention. In the second he alleges unlawful entry by fraud and stealth, and the unlawful detention of the premises. The defendants answer without objection to the form and substance to the complaint, and deny generally the allegations of each count, and plead in substance that the defendants are lawfully possessed of the premises, as tenants of one O'Neill, who is the owner thereof by purchase from the plaintiff; and they further plead that an action of ejectment is now pending in the district court of Lawrence county, between said O'Neill as plaintiff and said Murry as defendant, to determine the title to the premises in controversy in this action. The answer is verified, and demands that the action be certified to the district court. The plaintiff replies, denying generally the allegations of the answer. The case was tried to a jury, and a general verdict was rendered in favor of the plaintiff; and a motion for a new trial having been denied, and a judgment directing the removal of defendants from the premises having been entered, defendants bring the cause here for review.

A large number of errors are assigned by the appellant, but we shall only notice those pertinent to the discussion of the case, in the view we have taken of the issues raised by the pleadings and determined by the verdict of the jury.

After the plaintiff had introduced evidence tending to establish possession of the premises, and an unlawful entry by the defendants, the defendant O'Neill, being a witness in his own behalf, was asked by his counsel: *Question.* "Prior to the time you say you were dispossessed in March, how long had you been in the actual possession of that ranch, and from whom did you receive the possession?" To which question the plaintiff objected as immaterial, and which objection being sustained by the court, the defendant made the following offer: "Defendants now offer to prove by the witness Peter O'Neill that, prior to the 18th day of March, 1883, he had been continuously in the quiet, peaceable and lawful possession of the ranch in question, and was occupying the house thereon by himself and employees since the 15th day of November, 1882, and that on or about the 18th day of March, 1883, the plaintiff, John W. Murry, during the temporary absence of defendant O'Neill, and his employee William Jones, in Deadwood, took possession of the house and premises with force and arms, and held them for a few days in that manner, when he, O'Neill, regained peaceable possession of the house." This offer was objected to as incompetent, irrelevant, and immaterial. The court sustained the objection and rejected the testimony; to which defendants excepted. Subsequently certain testimony was admitted on the part of the defendants tending to show that the plaintiff, Murry, had conveyed the premises to the defendant O'Neill in November, 1881, and that O'Neill had leased the premises back to Murry for one year, ending November, 1882; and that in November, 1882, after the expiration of said lease, the plaintiff, Murry, had quit and surrendered up the possession of said premises to the defendant O'Neill, and that the defendant O'Neill had thereafter and up to the 18th day of March, 1883 (the date of the alleged unlawful entry), held the peaceable and uninterrupted possession of said premises; and that such possession was consented to and acquiesced in by Murry; but that on the 18th day of March, 1883, Murry forcibly entered upon the

premises and ejected the defendant's (O'Neill's) tenants, and that some days thereafter the defendants had peaceably regained possession, and had thereafter continued to hold the same.

The court, upon motion of plaintiff and against the objection of defendants, struck out all that portion of the evidence relating to defendants' possession prior to March 18, 1883, and this ruling of the court was assigned as error.

The defendant also offered in evidence the deed from Murry to O'Neill, and the lease from O'Neill to Murry which were, upon plaintiff's objection, ruled out by the court, and to this ruling the defendants duly excepted.

Did the court err in striking out the evidence relating to the possession of the premises by defendant O'Neill prior to March 18, 1883, and in rejecting the offer of the defendants to prove the same?

This will depend upon the construction to be given to our statute of forcible entry and detainer, under which this action is brought. That portion of the section of our statute upon which this action is founded is contained in the Justices' Code, and reads as follows: Sec. 34. "This action is maintained (1) where a party has by force, intimidation, fraud, or stealth, entered upon the prior actual possession of real property of another and detains the same; (2) where a party, after entering peaceably upon real property, turns out by force, threats, or menacing conduct, the party in possession; or, (3) where he by force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise." The plaintiff contends, under the literal reading of the first division of this section, that any person is liable to this proceeding who enters upon the "prior actual possession of another" by force or by fraud or stealth, no matter what his interests or rights may be in the property entered upon, and no matter what otherwise may be the character of the possession entered upon; that a person's own property may be entered upon by another without color of right, and, if the owner subsequently succeed in regaining possession without committing a breach of the peace, yet the unlawful intruder may invoke the aid of the courts and recover the possession from the lawful owner, whenever that possession was regained

by fraud or stealth or force amounting to a breaking of the close. If this is the construction to be given our statute, which is the one which seems to have been followed by the lower court, then there was no error in rejecting the offer, and in striking out the evidence as to the prior possession of the defendant.

Statutes of forcible entry and detainer are of very ancient origin; they date far back into the fourteenth century; they succeeded the wager of battle; they were criminal in character, and were designed to prevent redress of private wrongs by means calculated to disturb the peace and good order of society, in the use of force and violence of a nature to inspire terror and incite personal conflict. These statutes were highly penal in character, and were enforced by indictment of the grand jury or by complaint before a magistrate, and terminated, when unfavorable to the offender, in a fine to the king, and an ouster from the premises unlawfully entered, as a punishment for the offense, and not as a determination of any right of the parties. No title passed or was affected by these proceedings, which were generally summary in character and were prosecuted in the name of the sovereign. In modern times these statutes have undergone great changes; and while generally the summary character of these proceedings remains, yet so great has been the change wrought by legislation that modern statutes of forcible entry and detainer retain but little of their former force and character beyond the name they bear.

In nearly all if not in every state of the Union there is now some civil proceeding in the nature of, or called by the name of, forcible entry and detainer, whereby a party whose possession has been unlawfully entered upon may have the intruder summarily ejected, not for the purpose of punishing the trespasser, but for the purpose of protecting private rights; and such actions are generally prosecuted, not in the name of the sovereign, but in the name of the injured party. It is true that in some jurisdictions these proceedings still retain their criminal characteristics, but in many of the younger states these jurisdictions are separate and distinct. The statute is either made to subserve a double purpose—that is, to protect private rights and to punish public wrongs—or the enactments are separate and distinct in character. To the latter class belongs

the legislation of Dakota. The civil proceeding is found in the Justices' Code, art. 7, while the criminal proceeding is found in and the punishment is prescribed by sections 492, 493 *et seq.* of the Penal Code. The latter is enforced by indictment in the name of the territory, while the former is denominated an "action," and is begun and tried as a civil action in the name of the party interested. So different are the statutes of the different states in character, and so unlike in phraseology and construction, that but little benefit can be derived from their comparison, or from an examination of the decisions of the courts in their interpretation. Our own statute was taken from the two states of Iowa and California, with some original sections added and some very important changes made therein, as we shall hereafter observe.

Section 34, art. 7 of the Justices' Code, which contains the six subdivisions enumerating the cases in which this proceeding will lie, comes from both California and Iowa. Subdivision 1, which provides that the action is maintainable "where a party has, by force, intimidation, fraud, or stealth, entered upon the prior actual possession of real property of another, and detains the same," was taken from Iowa except as modified by our own legislature, as we shall hereafter notice. Subdivisions 2 and 3 are taken from California with no material change. Subdivisions 4 and 5 are taken from Iowa with some modifications immaterial to be noticed here. Subdivision 6 is not found in either statute. Sections 35, 36, 38 and section 40, before amendment in 1881, were taken from Iowa with some modifications; while sections 37, 39, 41 are almost entirely original and quite unlike the statutes of any other state. A comparison of the statutes of Iowa (Code of 1873) and the statutes of California of the same year will make it quite apparent that the person or persons who drafted our statute of forcible entry and detainer had before him or them the enactments of these two states, and that they borrowed from them such parts as they deemed suited to this locality, and rejected the other parts of those statutes which they deemed unsuited. They added new sections and provisos in place of those rejected, the effect of which will be apparent as we proceed. The first remarkable change is in the phraseology of the first subdivision above quoted. The Iowa subdivision reads as follows: (1) "Where the defendant has,

by force or fraud or stealth, entered upon the prior actual possession of another in real property and detains the same." Code, Iowa, 1873, § 3611. The material change, as will be observed, consists in placing the words "of another" after the words "real property" in our statute, instead of after the words "actual possession," as in the Iowa statute, whereby the meaning of the sentence is made to be (if the pronoun "another" is made to qualify as its antecedent the noun immediately preceding, according to the usual rules of construction) that this action is maintainable where a party has entered by force, etc., upon the prior actual possession of another's real property, while the meaning of the Iowa statute must be construed to be that the proceeding is maintainable where a party by force, etc., has entered upon another's prior actual possession; and if this change was intentional, as it will be presumed to have been, and the word "another" is made to qualify its preceding noun as antecedent, then the difference in the two statutes is radical in this respect: that, while the Iowa statute applies to all real property, and makes the party who enters by force, etc., upon his own as well as upon the real property of another held adversely guilty of this offense, our statute makes the party guilty only who enters by force, etc., upon the real property of another; and while it would be no defense in Iowa to allege and prove that the defendant was the owner of the premises alleged to have been unlawfully entered, it would be a perfect defense under our statute, which confines the remedy to lands of another so entered upon. If this were the only change made in adopting the Iowa and California statutes, the court might feel some hesitancy in employing this usual and natural construction of language, but our legislature did not stop here. It proceeded to emphasize this construction, and to enact in terms that the forcible entry and detainer act, in its enforcement by justices of the peace, should not extend to cases in which the title to real property should in any wise come in question.

Subdivision 7, § 2, Justices' Code, defining the jurisdiction of justices of the peace, provides: "The civil jurisdiction of these courts, within their respective counties, extends \* \* \* (7) to actions of forcible entry and detainer, or detainer only of real property, where the title or boundary thereof in no wise comes in



question;" and to remove any misconstruction that might be placed upon these enumerated powers, it is expressly enacted in the forcible entry and detainer act itself: "Provided that, when the title to or boundary of the real property in any wise comes in question, the case shall be certified to the district court as in this chapter provided." Article 7, § 37, Justices' Code. Section 10 of the chapter above referred to provides that, when it appears that the determination of the action will necessarily "involve the question of title to or boundary of real property in any wise, the justice must suspend all further proceedings in the action," and certify the case to the district court. These provisions are not found in the Iowa or California codes. It is an original provision. It is clearly intended to oust the jurisdiction of the justice when the defendant pleads title, and is intended to confine this remedy to that of protecting the private right of lawful possession, and to give the owner a summary remedy for recovering possession from the intruder or wrongful holder of his real property. To hold otherwise would be to treat the words of the statute requiring the justice to certify the cause to the district court, "whenever the title to or boundary of real property in any wise comes in question," as idle and meaningless. The title to or boundary of real property could never come in question unless it was put in question by a contesting party, either by the pleadings or the evidence offered; and if the contesting party could not raise the question of title or boundary to real property, and if the legislature intended that the owner of real property should not be heard to assert his title in such cases, it was a work of supererogation for it to enact that "whenever such title should come in question" the case should be certified to the district court. No room is left for doubt, however, when we consider the enumerated powers of the justice of the peace. These courts are courts of limited jurisdiction. They have and can exercise no powers except such as are expressly granted or are necessarily implied from powers expressly granted; and, when the legislature granted to justices of the peace power to determine actions of forcible entry and detainer in cases "where the title or boundary of real property in no wise comes in question," it in terms reserved or declined to allow them to exercise jurisdiction in any case where the



contesting party claimed ownership of the property, and in a proper way brought such claim of title in question. Where such title or boundary properly comes in question, the jurisdiction of the justice is ousted, and the case must be certified to the court having jurisdiction. Our forcible entry and detainer act further differs from the acts after which it was modeled in designating the proceedings under it as an "action." Section 33, Justices' Code. And instead of a verdict of "guilty" or "not guilty," as provided by the Iowa statute, our statute provides for a "finding of the court" and "general verdict" of the jury and "judgment" as in other cases, and also for "rents and profits or damages when demanded in the complaint." Laws 1881, chap. 87.

We have no doubt, from a careful examination of the provisions of our statute upon forcible entry and detainer, as well of other sections of contemporaneous statutes as of those subsequently enacted, that the construction intended to be given by the legislature and the construction which should be given to it by the courts is that it is a civil remedy designed to furnish an owner of real property — that is, one having a general or special title sufficient to give him the right of possession — a summary remedy to recover such possession from one who has wrongfully ousted him and is a mere trespasser or intruder without color of right to the premises. And the Iowa supreme court expresses much the same opinion upon their statute which does not contain the sections and provisos we have added. That court says, in *Harrow v. Baker*, 2 G. Greene, 203: "In England proceedings of this kind are either by indictment or by a complaint before a justice of the peace, in the nature of a criminal prosecution. That which by their law is made an offense punishable by fine and imprisonment is by ours a civil action to obtain possession."

It is true that this view of the case was not presented to the court below, and it is also true that appellate courts will content themselves with reviewing cases as made by parties in the lower court, and will not review as error what has not been presented to and passed upon by the lower court; but this rule, as we understand it, is confined to irregularities merely occurring at the trial which have resulted in prejudice to the defeated party, and not to matters of jurisdiction affecting the validity of the judgment.

Questions not amounting to mere irregularities, and questions affecting the jurisdiction of the court may be heard for the first time in the appellate court. Says WOODBURY, J., speaking for the supreme court, in *Garland v. Davis*, 4 How. 143: "In the examination of this case, a defect has been discovered in the pleadings and verdict, which was not noticed in the court below, nor suggested by the counsel here." And in determining that it was the duty of the court to notice material defects not raised by counsel, the court further on says: "It is the duty of the court to give judgment on the whole record and not merely on the points started by counsel." Citing *Slacum v. Pomery*, 6 Cranch, 221; *Baird v. Mattox*, 1 Call. 257; *Roach v. Hulings*, 16 Pet. 319. And such has been the holding of this court. *Fargo v. Palmer*, 29 N. W. Rep. 463 (February Term, 1886); *Raymond v. Campbell* (February Term, 1888); *Holt v. Van Eps*, 1 Dak. 206.

The answer seems to have been framed to raise this issue, and it was duly verified, but the record is silent as to the presentation to the court of this question in any manner, and the lower court does not seem to have passed upon it further than it may be said to have done so indirectly by retaining jurisdiction of the case, and in entering a judgment for the plaintiff. The defendants, when offering the deed and lease in evidence, made the offer upon the ground of showing good faith, and not for the purpose of proving title in the defendant O'Neill. We are, however, of the opinion that the question was one of jurisdiction, and if the justice was not required, from the sworn statements and the allegations of title contained in the answer, to certify the cause to the district court, he was certainly bound to do so when, from offers made and evidence introduced, the question of title to the premises in controversy was squarely at issue between the parties, and was properly presented for its consideration, and that from the time such issue of title was properly presented to the court its jurisdiction ceased, and any subsequent decision or judgment made or rendered by it, except to certify the cause as provided by the statute, was *coram non judice*.

This would perhaps end this case, and save further discussion, but for the suggestion that though the parties submitted to the jurisdiction of the justice of the peace, and he finally determined

the action instead of certifying it, as required in such case, yet the effect was the same so far as it regards the jurisdiction of the district court, whether it came up by certificate of the justice or by appeal, so long as no question was raised in the district court as to the method of bringing it there. While we doubt this position to be well taken, and while the better opinion would seem to be that the district court could exercise no jurisdiction over cases coming up from the justice's court except in a way expressly pointed out by the statute, yet, as the forcible entry and detainer law is now for the first time before this court for construction, and as the question is one of importance to the profession as well as to suitors, and as it has been fully argued upon its merits, both sides tacitly admitting that the district court obtained jurisdiction by the means adopted to remove the action from the justice court, whether the proceeding be an appeal in fact or a certification in effect, we will proceed to examine the statute from this standpoint. The action would then become one of ejectment in effect wherein the title of the parties or their immediate right of possession became the matter in issue; and the offer of defendant to prove prior possession, and the evidence offered of title as well as that struck out, tending to prove ownership and occupancy on the part of O'Neill, were clearly relevant and material, and the rulings of the court, in sustaining plaintiff's motion to strike out and the objections to the testimony offered, were clearly erroneous.

In any view of the law of forcible entry and detainer the extended quiet and peaceable possession of the premises for a period of more than four months, known and acquiesced in by the plaintiff, was clearly competent to be given in evidence to show the character of the possession which the plaintiff relied upon to maintain his action under the facts of this case. It is true that a mere prior possession does not in an action of forcible entry and detainer constitute a defense (*Brown v. Perry*, 39 Cal. 23); neither does title under most statutes. But the offer here went further than to mere prior possession. It was coupled with the further offer that while so possessed the plaintiff unlawfully ousted him, and that he subsequently and within a few days thereafter recovered peaceable possession. Evidence proving such facts as are contained in this offer was clearly competent to show the character of

plaintiff's possession upon which he relied to maintain his action. The offer was rejected on the ground that it was incompetent, and not upon the ground of bad faith; and though the offer was perhaps fully as broad as the evidence when produced would warrant, as such offers usually are, yet, when the court rejects such general offer as incompetent, the appellate court is bound to presume the facts stated in the offer are true. *Scotland v. Hill*, 112 U. S. 185, 5 Sup. Ct. Rep. 93.

We cannot adopt the construction of this statute which is contended for by attorneys for the plaintiff, that any actual possession merely of real property is a sufficient basis for this action. That one party may enter upon the peaceable possession of another and wrongfully eject him, and that the person so ejected may not peaceably regain possession, but must resort to an action to expel the intruder, it cannot be that such wrongful intruder may invoke the power of the court to dispossess the rightful occupant who has merely reclaimed his own. If so, then the statute in its construction permits "a party to take advantage of his own wrong" in violation of a fundamental maxim of the law. The offer shows that O'Neill had long enjoyed peaceable possession; that Murry, by force and in violation of law, ousted him; and that he, O'Neill, peaceably regained possession. Murry relies upon such possession to maintain this action. Ought he to be in any better position now, by reason of such wrongful entry, to maintain his action than he would have been in before such entry? Is it possible that Murry, by making the wrongful entry, has obtained a right of recovery against O'Neill for the possession of the premises that he did not have before such entry? If he has, then his wrongful act has conferred this right; and the law, which it is claimed was designed to prevent a breach of the peace, holds out an inducement for its breach, and the court is required to say to all trespassers, if they desire to possess another's property: "You may take it first by force, then give the owner an opportunity to peaceably regain its possession (which he will most probably do), and the courts will then confirm your wrongful act by ousting the rightful possessor, and mulct him in damages and costs for thus presuming to take possession of his own property." The law leads to no such absurdities, and this statute requires of

the courts no such violent and unnatural construction. While the words of the statute give a right of action for a wrongful entry upon another's actual possession, these words must not be construed to include a possession taken by force and violence, and held by threats and menace, or by force and arms, against the rightful claimant striving to regain his possession whenever he may do so, either by precept of the court or by peaceable recaption or entry. It must not be construed to include a scrambling possession alternately gained and lost. The statute was not intended to break down and destroy all the rights of possession and property that have come down to us from the earliest period of the common law. The doctrine of recaption is as old and as well-settled a rule of human action as the right of defense of one's property. Blackstone lays down the rule as follows: "As recaption is a remedy given to the party himself for an injury to his personal property, so, thirdly a remedy of the same kind for injuries to real property is by entry on lands and tenements when another person without any right has taken possession thereof." 3 Bl. Comm. 5. Lord KENYON, as strict a constructionist of the common law as ever sat upon the English bench, states the doctrine thus: "The question is whether a person having a right of possession may not peaceably assert it, if he do not transgress the laws of his country. I think he may, for a person who has a right of entry may enter peaceably, and being in possession may retain it, and plead that it is his soil and freehold, and this will not break in upon any rule of law respecting the mode of obtaining the possession of lands." Taylor v. Cole, 3 Term R. 296. Judge COOLEY states the rule as it now exists as follows: "Of the same nature as the right of recaption is the right which the owner of lands has, when another is wrongfully in possession thereof, to re-enter when he may do so peacefully, and thereafter to exclude the wrong-doer therefrom. This right may exist either where one has gone into possession without right, or where one, having had an estate in, or at least lawful possession of the lands, has had his right terminated by operation of law or by the act of the owner. \* \* \* It must be had in a peaceful manner; and an actual possession, though wrongful, must not be subverted by the employment of force." Cooley, Torts, 57, 58. The law, as

laid down by the American courts, will be found in *McDougall v. Sitcher*, 1 Johns. 42; *Hyatt v. Wood*, 4 id. 157; *Jackson v. Farmer*, 9 Wend. 201; *Wood v. Phillips*, 43 N. Y. 152; *Bliss v. Johnson*, 73 id. 529; *Tribble v. Frame*, 7 A. K. Marsh. 529; *Com. v. Dudley*, 10 Mass. 409; 4 Kent Com. 118.

In the case of *Bowers v. Cherokee Bob*, 45 Cal. 495, where the lower court ruled out evidence of the prior efforts of the defendant to regain possession for the purpose of showing the character of the plaintiff's possession, that it was not actual, peaceable, etc., but had been submitted to on the part of the defendant by necessity and not acquiesced in willingly, the supreme court held such testimony competent and proper, and that the possession which has been disturbed and of which the plaintiff complains must be a quiet and peaceable one, acquiesced in and submitted to by the defendant, prior to the wrongful entry; and in delivering the opinion of the court, the learned judge uses the following pertinent language: "If the rule were otherwise, the most deplorable results would ensue. A ruffian might enter a private dwelling without color of right, and in mere wantonness expel its inmates, barricade the doors, and by an exhibition of fire-arms prevent the owner from approaching his own dwelling. The owner might make the most determined and persistent efforts to re-enter his own dwelling, but be as often repulsed by violence or threats; and, if he should ultimately succeed, we apprehend no respectable court would hold that the intruder had acquired a 'peaceable' possession, on which he could maintain an action for forcible entry against the former occupant. If a different rule prevailed, it would operate as a premium upon lawless aggression and an incentive to the grossest outrages; and no one would be safe in his possession of real property, if it was understood to be the law that any ruffian may intrude upon premises in the actual possession of another, maintain his possession by force or menaces for a time, and when expelled by the former occupant, after repeated unsuccessful efforts to regain the possession, might maintain an action for forcible entry, on the plea that he had acquired a 'peaceable' possession."

It is true the California Code uses the word "peaceable," in describing the possession upon which a recovery may be based, in



addition to the word "actual," but, if our statute did not permit the defendant to plead his defense of title, we should be loth to declare that "actual possession" should be construed to include a forcible and wrongful possession, not submitted to or acquiesced in by the defendant. See, also, *Wood v. Phillips*, 43 N. Y. 152; *Powell v. Lane*, 45 Cal. 677.

The case of *Brooks v. Warren* (Utah), 13 Pac. Rep. 175, is very much in point. Brooks and others entered upon the premises formerly occupied by Warren and others as a cattle ranch. The house at the time was open and unoccupied, but contained a few articles of personal property of little value belonging to Warren. Warren claimed to own the house and to have built it, and to have built the corrals and fences on the premises. The case does not disclose what, if any, claim of right Brooks had to the property. He took possession of the premises during the absence of Warren, and claimed the right to maintain his possession by force. During the temporary absence of Brooks from the premises, Warren returned and peaceably took possession, ordering away the person left in charge under Brooks, who surrendered possession without resistance. The justice of the peace, before whom the action was instituted, held that Brooks was "peaceably in the actual possession" at the time of the entry of Warren, but the district court reversed the case, holding that Brooks' entry was forcible and wrongful, and that Warren had the right to retake possession of the property from which he had been wrongfully ousted, when he could do so peaceably; and the supreme court, in sustaining the view of the district court, in which all the justices concur, says: "It seems to have been but another instance so often resorted to of taking the law into one's own hands, and, after meeting defeat, to turn to the law for help." The case bears a very singular analogy to the case at bar. Here O'Neill, as the record discloses, had held uninterrupted and undisturbed possession of the premises for several months. Murry took possession of the premises by force, during O'Neill's absence, and by force sought to maintain such possession. O'Neill, without acquiescing in such possession of Murry, appealed to the courts, but before a determination of his rights subsequently regained peaceable possession, and Murry resorted to the courts, founding his right of

recovery upon his "actual possession" forcibly taken. Without setting up a claim of title to the premises, O'Neill ought to have been permitted to show the character of the possession upon which Murry relied to recover, and the evidence offered and the evidence excluded clearly tended to do this, and should have been admitted; but, under the construction we have given the statute allowing the defendant to assert his title to the premises, the justice, under the pleadings and the testimony offered in evidence, should have certified the case to the district court, and upon trial in the district court such evidence was clearly proper to show the prior possessory right of O'Neill as against the wrong-doer who had entered upon such prior possession by force. The judgment of the lower court is reversed. All the justices concur.

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**FARRIS, Appellant, v. VANNIER, Respondent.**

**1. Constitutional Law — Taxes, Local — Foreign Use — Validity.**

Section 17, chap. 28, Pol. C., as amended in 1885, providing that personal property in any unorganized county shall be subject "to taxation in the nearest organized county," is invalid in so far as it permits the collection of a county tax in an unorganized county for the use and benefit of the organized county.

**2. Same — General Tax — Validity.**

A territorial tax collected under this section in an unorganized county is not invalid, nor is the section (there being no authority for taxing the real estate in such counties) in conflict with § 1925, R. S. U. S., prohibiting the legislature from making "any discrimination in taxing different kinds of property," nor is the section local or special in its nature. THOMAS, J., dissenting.

(Argued Feb. 16, 1888; reversed May 25, 1888; opinion filed Feb. 19, 1889.)

*T. R. Selmes and J. C. Bullett, Jr., for appellant.*

The only question is, whether § 2, Laws 1885, p. 191, in so far as it authorizes the taxation of personal property in unorganized counties, is constitutional.

It is unconstitutional for, (1) it authorizes taxation of persons and property of a community for purposes not public and local to such community; (2) it discriminates in the taxation of different kinds of property, in contravention of the organic act of the



territory; and (3), it denies to persons within the jurisdiction of the territory the equal protection of the laws.

Upon the first point, see *Cooley*, *Taxation* (2d ed.), chap. 4, 5; *Cooley*, *Const. Lim.* (5th ed.), chap. 14; 1 *Desty*, *Taxation*, chap. 2; *Loan Association v. Topeka*, 20 Wall. 662; *Cole v. La Grange*, 113 U. S. 1; *Sharpless v. Mayor*, 21 Pa. St. 147, 59 Am. Dec. 759; *Philadelphia v. Wood*, 39 Pa. St. 82; *Speer v. School Directors*, 50 id. 150; *Grimm v. Weissenberg*, 57 id. 433; *Washington Avenue*, 69 id. 352; *Hammett v. Philadelphia*, 65 id. 146; *In re Saw-mill Run Bridge*, 85 id. 163; *Clarke v. City*, 13 How. Pr. 204; *Weismer v. Village*, 64 N. Y. 91; *People v. Bachellor*, 53 id. 128; *Clarke v. City*, 24 Barb. 446; *Ferland v. Hastings*, 10 Alien, 570; *Lowell v. Boston*, 111 Mass. 454; *Opinions of Justices*, 58 Me. 590; *Allen v. Inhabitants of Jay*, 60 id. 124; *Perry v. Keene*, 56 N. H. 514; *Town of Bennington v. Park*, 50 Vt. 178; *Atkins v. Town of Randolph*, 31 id. 246; *Coster v. Tide-Water Co.*, 3 C. E. Green, 54; *State v. Jackson*, 2 Vroom, 189; *State v. Demarest*, 3 id. 528; *Talbot Co. v. Queen Anne's Co.*, 50 Md. 245; *McBean v. Chandler*, 9 Heisk. 349; *Stein v. Mayor*, 24 Ala. 591; *Lexington v. McQuillans*, 9 Dana, 513; *Cheaney v. Hooser*, 9 B. Mon. 330; *City v. Southgate*, 15 id. 491; *Swift v. City of Newport*, 7 Bush, 37; *Sleight v. People*, 74 Ill. 47; *Livingston Co. v. Weider*, 64 id. 428; *Trustees v. People*, 63 id. 299; *Taylor v. Thompson*, 42 id. 9; *People v. Salem*, 20 Mich. 474; *Wells v. City*, 22 Mo. 384; *State v. Leffingwell*, 54 id. 458; *National Bank v. Ioia*, 9 Kan. 689; *State v. Osawkee*, 14 id. 418; *Railroad Co. v. Smith*, 23 id. 745; *Stockton, etc., R. Co. v. City*, 41 Cal. 147; *Davidson v. Ramsey Co.*, 18 Minn. 482; *Morford v. Unger*, 8 Ia. 182; *Butler v. City*, 11 id. 433; *Burlington, etc., R. Co. v. Spearman*, 12 id. 112; *Buell v. Ball*, 20 id. 282; *Deeds v. Sanborn*, 26 id. 419; *Hanson v. Vernon*, 27 id. 28; *Deiman v. Fort Madison*, 30 id. 542; *Brodhead v. City*, 19 Wis. 624; *State v. Haben*, 22 id. 660; *Curtis v. Whipple*, 24 id. 350; *State v. Tappan*, 29 id. 664; *Soens v. City*, 10 id. 279; *Lumsden v. Cross*, 10 id. 282; *Knowlton v. Supervisors*, 9 id. 410; *Whitney v. Sheboygan, etc., R. Co.*, 25 id. 167.

The section authorizes Stark county to tax Billings county for its governmental purposes. It is conceded that the latter county

is in no way interested or concerned in the objects for which the taxes (except the general territorial tax) were levied, and that the taxes are to be expended wholly within Stark county without any benefit accruing to Billings county, or its inhabitants.

The act discriminates in the taxation of different kinds of property in violation of the organic act. § 6, R. S. U. S., § 1925; *People v. McCreery*, 34 Cal. 433; *People v. Whartenby*, 38 id. 461; *Lick v. Austin*, 43 id. 590; *Fields v. Commissioners*, 36 Ohio St. 476; *Pike v. State*, 5 Ark. 204; *Crow v. State*, 14 Mo. 237, 262; *Hamilton v. St. Louis*, 15 id. 3; *State v. North*, 27 id. 464; *State v. County*, 34 id. 546.

The case of *Francis v. Atchison, etc., R. R. Co.*, 19 Kan. 303, seems at first glance to sustain the view that a tax law which fails to provide for the taxation of certain kinds of property is not for that reason invalid, but it is clearly distinguishable from the case at bar. It is analogous to the case of *Wisconsin C. R. R. Co. v. Taylor*, 52 Wis. 37, neither of which is applicable to the facts here presented.

The act is unconstitutional because it denies to persons within the territory the equal protection of the laws. *Cooley, Taxation* (2d ed.), 5; *Santa Clara Co. v. Southern P. R. R. Co.*, 18 Fed. Rep. 385; *R. R. Tax Cases*, 13 id. 722; *Northern P. R. R. Co. v. Carland*, 5 Mont. 146, 3 Pac. Rep. 134.

*William Gibson and Flannery & Cooke*, for respondent.

All costs of criminal prosecutions in an unorganized county when not collected from it, are paid out of the territorial treasury. *Laws 1881*, p. 110. This would render the general tax of public concern. Of such concern also is the school, road and bridge tax. *Kelly v. Pittsburgh*, 104 U. S. 78; *Township v. Township*, 39 Mich. 424; *Cooley, Taxation*, 94, 478; *People v. Supervisors*, 20 N. Y. 255; *Railroad Co. v. County*, 16 Wall. 667.

Civil and criminal jurisdiction is extended over unorganized counties, and the general tax is required to meet the expenses thereof. The statute is also valid under the power to create taxing districts. *Cooley*, 110; *People v. Lawrence*, 41 N. Y. 141; *Litchfield v. Vernon*, id. 123; *Malchus v. Heghlands*, 4 Bush,

547; Salem Turnpike, etc., Co. v. Essex Co., 100 Mass. 282; Commissioner, etc. v. Commissioner, etc., 92 U. S. 307.

That the act discriminates in the taxation of different kinds of property, in violation of the organic act, is not well taken. The legislative power extends to all rightful subjects of legislation. R. S. U. S., § 1851. This includes the power to levy taxes.

The objection to the contention that section 1925, R. S. U. S., renders all property subject to taxation, is that the section is not a grant of power but a restriction upon the legislative grant of section 1851. The only power to levy taxes is contained in this general grant, and is full and complete, subject to the prohibitions and restrictions of section 1925. *Winona & St. P. R. R. Co. v. County*, 3 Dak. 1. The meaning of this restriction is that when the legislature has made real and personal property subject to taxation it must be taxed in proportion to its value and no higher or lower rate shall be levied upon the one than the other. The power to determine what property is subject to taxation necessarily implies the power to exempt. The legislature has always exercised this power. *Laws 1862*, p. 420. Specific exemption of property from taxation has been made from the beginning, and the power to do so has never been challenged before. That the power to do so exists under limitations similar to those existing here, see *Wisconsin C. R. R. Co. v. Taylor*, 52 Wis. 37; *Francis v. Atchison, T. & S. F. R. R. Co.*, 19 Kan. 303; *Roscommon v. Midland*, 39 Mich. 424; *Flan. C. Co. v. Fought*, 5 S. W. Rep. 494.

The contention that the act is unconstitutional in that it denies to persons within the territory the equal protection of the laws, is answered in his having the protection of the laws as above shown.

THOMAS, J. This action was brought by the plaintiff for the recovery of certain taxes paid by him under protest. The complaint alleges, *inter alia*, that plaintiff was at the time of the grievances complained of a resident of the unorganized county of Billings, and owner of real and personal property therein, and had no property in the county of Stark. That on the 12th day of March, 1885, the legislature of the territory passed an act entitled "An act to amend section 17 of chapter 28 of the Political Code," and, among other things, provided as follows: "When any personal property is situated and kept in any unorganized county of this ter-

ritory, then such property shall be subject to taxation in the nearest organized county thereto, and shall be listed and assessed by the assessor of said nearest organized county ; and when said unorganized county borders upon two or more organized counties, then said property shall be assessed and taxed in that organized county having the greatest extent of contiguous boundary line."

That pursuant to said act, in the year of 1885, the officers of said Stark county, authorized by the laws of this territory to assess property in said Stark county for the purposes of taxation, and to levy taxes thereon, claimed to have the right and pretended to assess all the personal property of the plaintiff situate in said Billings county, for the purpose of taxation, and to levy certain taxes thereon, to-wit, territorial, general school, bridge, and road, and general county taxes, amounting in the aggregate to the sum of \$29.20.

That the assessment, levy and collection of said taxes were illegal because — *First*, said property was never taxable by Stark county; *second*, that the act of 1885 is in conflict with the provision of the organic act in relation to taxation, and therefore void ; *third*, the tax is for the exclusive use of Stark county, and to be expended therein, with the exception of the territorial tax, and gives to Billings county and the residents thereof no benefit, directly or indirectly ; *fourth*, that there was real estate in Billings county owned by plaintiff and others, none of which was assessed or taxed, but under said act was free therefrom ; *fifth*, that said Stark county issued its warrant to its treasurer, the defendant, to collect said taxes, who demanded the same of plaintiff, which was refused, and thereupon defendant levied upon plaintiff's property, and was about to sell the same, to prevent which plaintiff, under protest, paid said taxes to said defendant, with interest and costs, amounting to \$29.40.

To this complaint defendant interposed a general demurrer, which was sustained by the district court, *pro forma*, and judgment was rendered thereon in favor of the defendant, from which said judgment plaintiff appeals to this court.

The plaintiff contends that the act of 1885 is unconstitutional for the following reasons : *First*, it authorizes taxation of personal property of a community for purposes not public or local to it ;

*second*, it discriminates in the taxation of different kinds of property in contravention of the organic act; *third*, it denies to persons within the territory the equal protection of the laws.

The material allegations of the complaint are admitted by the demurrer. It is therefore a fact of record that the taxes complained of were imposed and collected for the exclusive use and benefit of Stark county, and the moneys raised thereby were to be expended within said Stark county, except the territorial tax, and the residents of Billings county were not in any legal sense interested in any of the objects of said expenditure.

The organic act of the territory (§ 1925) declares that the legislature "shall not pass any law impairing the rights of private property, nor make any discrimination in taxing different kinds of property; but all property subject to taxation shall be taxed in proportion to its value."

The questions presented are important, and of great public interest, and are therefore entitled to, and have received, our most careful consideration.

The validity of this tax must be determined from the organic act and such other legal principles as may be applicable.

Under the second point above named the appellant contends that the legislature of this territory has no power to exempt any property from taxation except that which is expressly exempted in the organic act; the legislature cannot declare what property shall be subject to taxation, but must tax every species of property not exempt by the organic act. We do not think that this objection is well taken, or that it is necessarily involved in this case, and, as the legislature of the territory has frequently exercised this right, which has been acquiesced in and recognized by all classes as a legitimate exercise of power, we do not feel authorized to call it in question here. It is a doctrine well established by the courts that the right to exempt is incident to the right to tax, and is an ordinary exercise of the power of sovereignty, and this right exists unless prohibited by some constitutional or organic provision. *Railroad Co. v. Taylor*, 52 Wis. 42, 8 N. W. Rep. 833; *Gilman v. Sheboygan*, 2 Black, 510; *Cooley, Taxation*, 145; 1 *Desty, Taxation*, 124.

As said before, the right to exempt has been recognized and

acted upon since the organization of this territory, and we will not now disturb or cast doubt or reproach upon it by a discussion which would in any event be mere *dictum*, as this question is not involved in this case, for the act in question is not, in our opinion, an attempt to exempt any kind of property from taxation.

Under this act an attempt is made to assess and tax personal property in an unorganized county, leaving the real property untaxed, and to levy this tax for the use and benefit of another organized county, regardless of the question whether the two counties are in the same judicial district, or whether said counties have been attached for judicial, revenue, or other purposes, but it is sought to be done simply upon a question of proximity.

This legislation cannot, in our opinion, be properly referable to the exercise of the power of exemption, though it may possibly have this effect when it discriminates between different kinds of property by taxing one and not the other.

It is contended by plaintiff that this act provides for the taxation of a community for purposes not public or local to it. If this proposition be true, this tax can hardly be sustained. Cooley, Taxation, 105; 1 Desty, Taxation, 285.

It is a fact admitted of record that this tax was for the exclusive use and benefit of Stark county, and that the money raised by it was to be expended within Stark county, and that the county of Billings did not and will not receive any benefit from said tax, either directly or indirectly, but it was to be expended for objects entirely local to Stark county, and foreign to Billings county. If this be so, how can this tax be sustained? It is a well-established doctrine that taxation in order to be valid must be of a public nature, or for a public purpose, and must also be local. "It is the essence of taxation that it should compel the discharge of a burden by those upon whom it rests." An attempt to compel one county or municipality to pay a charge properly resting upon the inhabitants of another separate and distinct district or community would be an arbitrary and unauthorized exercise of power. It would be taking private property for private uses, and in no proper sense could it be regarded as taxation, but rather in the nature of confiscation. Cooley, Taxation, chap. 5, pp. 144, 145; 1 Desty, Taxation, 26, 27; Hammett v. Philadelphia, 65 Pa. St.

146, 151 ; Dorgan v. Boston, 12 Allen, 223 ; In re Town of Flatbush, 60 N. Y. 398.

It is true that it is not necessary that the money raised by taxation should always be expended within the district where it is levied and collected, but it may be expended for objects outside of the district in which the residents of the district have in a legal sense an interest. District interest is the test whether an object is or is not a proper subject of taxation. Cooley, *supra* ; 1 Desty, *supra*.

It seems to us that this law is an attempt on the part of the legislature to tax one community for the benefit of another, and is therefore void from the fact that all taxation must be public and local, and for objects in which those who pay the tax have, in a legal sense, some interest, and from which they may receive some benefit.

As said before, it is admitted of record in this case that the tax collected of the residents of Billings county was to be used and expended in matters entirely local to the county of Stark ; and to sustain such a tax would not only be unjust and inequitable, but would be to hold that the legislature, under color of exercising the power of taxation, might appropriate private property for private uses.

While equal, uniform, and just taxation is hardly attainable under any system of human government, yet in this country most of the states have incorporated into their constitutions express provisions that taxation shall be equal and uniform ; and, while this language is not used in our organic act, we think that the prohibition contained therein against discrimination in taxation can hardly be effectually enforced without the adoption of some system that shall be equal and uniform. Can it be said that a system of taxation which taxes one community for the exclusive use and benefit of another is in anywise equal or uniform as to these communities ? There are some fundamental principles which must be observed in every system of taxation. They should not only be for public purposes, but for purposes in which the party taxed has an interest, and from which he can and may receive some benefit. 1 Desty, Taxation, *supra* ; Cooley, Taxation, *supra*. It is needless to discuss at length a possibility of Billings county or the plain-



tiff receiving any benefit from, or being in any manner interested in, the tax collected under this law, when the fact of record here is contrariwise by reason of the allegation in the complaint, and the effect of the demurrer thereon.

We are, therefore, of the opinion that under the record as it appears in this case the county or local tax collected of the plaintiff was for purposes local to Stark county, and in which the plaintiff had no interest, and was, therefore, wrongfully and illegally collected of him.

But, it is contended by the respondent, the plaintiff and Billings county were interested in this tax, and benefited by it, because of the extension over this county of the civil and criminal jurisdiction of the justices of the peace of Stark county, and the service of process in the former county by the officers of the latter. *Vide* Laws 1881, p. 110, § 15.

A reference to this statute will disclose that in the execution of this law the county of Stark is subjected to no burden or expense growing out of the exercise of such jurisdiction, nor is the county of Billings benefited except from the contributions from the territorial treasury.

It is further contended by the respondent that the legislature has the right to create taxing districts without regard to pre-existing political subdivisions. This we readily concede; but it does not follow that the act in question should be construed as an exercise of such power, in the absence of any thing to indicate that such was the purpose or intent of such legislation.

Taxing districts are organized and created to subserve the common interest and welfare of the communities embraced within their limits, and not arbitrarily to work inequality, injustice and oppression, and when a law cannot be sustained without referring it to the exercise of power in a particular direction, and for a certain purpose, and such assumption exposes the legislature to the charge of injustice, it were better to relieve it of such imputation and hold the law void. *Cooley, Const. Lim. 614 et seq.*

But if we say that the effect of this law is to create taxing districts embracing the organized and unorganized counties, and can see no possible reason for the creation of such districts, but, on the contrary, can only attribute it to the exercise of an unjust and



arbitrary power, entailing gross injustice and oppression on a portion of the district, we should the rather deny such effect to the law, and decline to sustain it as the exercise of the power to create taxing districts.

It is further insisted, so far as the county tax is concerned, that this act is void because it discriminates in the taxation of different kinds of property, contrary to the provisions of the organic act.

By the organic act two things are required in regard to all taxation: *First*, that there shall be no discrimination in taxing different kinds of property; *second*, taxation in proportion to value. It is claimed that the act in question violates the first of these requirements. What is meant by discrimination? Does not discrimination involve some unequal selection of property which is subject to taxation, or some apportionment of the rate or rule by which the different kinds of property are required to bear an unequal or a non-uniform portion of the tax imposed? By the act under discussion only one kind or class of property is taxed in the unorganized counties; all other kinds, including real estate, are left untaxed. Is not this discrimination within the meaning of the organic act? If the legislature must tax all property, both real and personal, which is made subject to taxation, under what circumstances can any particular kind be taxed while some other kind is left untaxed? By what authority can the personal property in unorganized counties be taxed, and the real estate go untaxed? Will it be said that this law fixes the *situs* of personal property for taxation in the organized counties, and in such counties all property is taxed, and so there is no discrimination? If so, we reply that while the *situs* of personal property for taxation may be fixed by the legislature either in the county where the owner resides or where the property is kept, we know of no authority for holding that such *situs* may be fixed regardless of this qualification, as would be done in this case; for this personal property is neither kept in the organized county, nor does the owner reside there, but, *per contra*, both are in the unorganized county.

What is the present case? The plaintiff was a resident of the unorganized county of Billings, and owned therein both real and personal property at the time of the assessment, levy and collection of the taxes of which complaint is made. This unorganized

county was nearer to Stark county than to any other organized county. The two counties, with others, were in the same subdivision of the sixth judicial district, and, at the time, attached to the county of Morton for judicial purposes.

Now, if it were conceded that these taxes were local so far as Billings county was concerned, and that the effect of the law was to create a taxing district, yet we have remaining the fatal objection that in any aspect of the case it is in conflict with that provision of the organic act which prohibits discrimination in taxation of different kinds of property; for certainly the taxation of personal property and the non-taxation of real estate under similar conditions, when both under the general law have been made the subject of taxation, is obnoxious to this charge.

While we have discussed the several different phases of this question, we are, however, clearly of the opinion that the act in question attempts to levy and collect taxes from the inhabitants of Billings county for purposes not public or local to it, and for this reason the tax is invalid. We have arrived at this conclusion notwithstanding the fact that we recognize and fully appreciate the fact that it is a well and firmly established doctrine that "the power of taxation is a great governmental attribute with which the courts have very wisely shown an extreme unwillingness to interfere." But when this power is abused, or sought to be extended beyond its proper sphere, and under its guise property is taken for private uses, the abuse should share the fate of all other usurpations. Cooley, Const. Lim. chap. 14, pp. 615, 616.

The supreme court of Iowa, in the case of Morford v. Unger, 8 Ia. 92, makes use of the following language, which we deem pertinent to the case at bar, to-wit: "If there be such a flagrant and palpable departure from equality in the burden imposed; if it is imposed for the benefit of others, and for purposes in which those objecting have no interest, and therefore are not bound to contribute,—it is no matter in what form the power is exercised, whether in the unequal levy of the tax, or in the regulation of the boundaries of the local governments, which results in subjecting the party unjustly to local taxes, it must be regarded as coming within the prohibition of the constitution designed to protect private rights against aggression, however made, and

whether under the color of recognized power or not." The above is vigorous language, and, in our opinion, correctly draws the line in reference to the exercise of the power of taxation, and is equally applicable to taxation under our organic act.

It will be observed that up to this time we have not discussed directly the question of the validity of the territorial tax, but from the force of our reasoning *supra* we of necessity reach the conclusion that it is also illegal and void by reason of the fact that the law discriminates in the taxation of different kinds of property in unorganized counties, and therefore in conflict with the organic act on this subject.

In doing this we do not mean to be understood as holding that the general law of taxation must provide for the collection of taxes in unorganized counties in order to render it legal as to the organized counties of the territory. We do not so hold, but, on the contrary, we think it does not affect the general law in regard to taxation. We do not think it is incumbent upon the legislature to provide machinery for the collection of taxes in these sparsely-settled and unorganized communities. The laws of taxation are not made for deserts, wild wastes, and bleak and unsettled prairies, but for organized communities. In other words, the legislature is not bound to set in motion machinery for collecting taxes in unorganized and sparsely-settled communities when in its judgment the expense incident to its collection would be greater than the revenue thus received.

The organization of counties and clothing them with the habiliments of the law is somewhat in the nature of a political question, and largely in the discretion of the legislature, and its exercise will not be interfered with by the courts, unless grossly abused; but when the legislature attempts to reach one of these unorganized counties by setting in motion the machinery of the law for collecting taxes therein, we are of the opinion that it must provide for taxing and collecting the taxes on all kinds of property subject to taxation under the general law, and a failure to do this will operate as a discrimination forbidden by the organic act, and therefore illegal. It seems to us that this conclusion is in harmony not only with the law, but with sound reasoning. If this be not true, what is there to prevent the legislature from doing the same

thing as regards the wealthiest and most populous counties in the territory? We apprehend it will not be contended that it could indirectly or otherwise relieve the real estate of the rich and populous counties of Cass, Yankton, and Minnehaha from taxation, and only tax the personal property therein, by failing to provide machinery for the collection of the real estate tax, while it taxed all of the other counties on both real and personal property. If so, the provision in the organic act against discrimination and in favor of uniformity of taxation is of but little effect.

We have not overlooked the case of *Francis v. Railroad Co.*, 19 Kan. 303, relied on by respondent, decided in 1877 by the supreme court of that state, and which "at first blush," or from a casual reading of it, would seem to sustain the act here in question. That case was an injunction suit brought by the railroad company against the state treasurer to enjoin the collection of a tax levied for state purposes. The railroad company had about one hundred and six miles of its road in four of the unorganized counties of the state on which taxes were levied under a state law, which imposed upon the auditor of the state the duty of levying for state purposes a tax upon any railroad property located outside of the limits of organized counties, which tax should be the same as that levied upon other property, etc.

The constitutionality of this law was questioned under the section of the state constitution which required all laws of a general nature to have a uniform operation throughout the state, and prohibited special legislation when general laws could be made applicable, and also provided that the legislature should provide a uniform and general rate of assessment and taxation. The constitutional question considered by the court was whether the taxation of railroad property only in unorganized counties for state purposes was a non-uniform and unequal rate of assessment and taxation.

It must be observed that the case differs from the one at bar in several particulars: *First*, the Kansas tax was only for state purposes; *second*, it was enforced through state machinery; *third*, the constitution of the state did not expressly prohibit discrimination, as does our organic act.

The opinion of the court is pronounced by an eminent jurist,

Judge BREWER, and concludes in the following language: "The case has been before us for several months, and the subject of repeated consultations and frequent examinations. The conclusions which we have reached are by no means entirely satisfactory to us. We hold the section to be constitutional and valid, not because it is clear to us that it is so, but because it is not clear to us that it is not; and the benefit of the doubt must be given to the law. The question would be different if discrimination was attempted between property in organized counties, or if the constitution did not contain but a single provision, which seems to imply and rest upon the assumption of organized communities." The court also say in this opinion: "The freedom from taxation of property other than railroad property in the unorganized counties under the act of 1876 arises in the same manner as the freedom of all property in such counties under prior statutes, and that is, through the failure to provide machinery for reaching it. The question, therefore, is whether the failure to provide machinery for collecting taxes on all the property in the unorganized counties renders unconstitutional the means employed to collect taxes on a portion of said property, and invalidates the tax attempted to be collected by such means."

The court admits the question is difficult, and that an answer either way is hardly reconcilable with common justice, or the history of the state's system of taxation. We entertain a high respect for the court which sustained this legislation of Kansas, and especially for the eminent judge who rendered the opinion; but the reasoning of the court is not clear or satisfactory to us, and we are not prepared to yield assent to the conclusions reached.

If the failure on the part of the state to provide machinery for reaching one class of taxable property within its limits, while other classes are taxed, cannot be criticised by the courts, what is there to prevent a state from doing in this way indirectly, though effectually, what we apprehend will be universally conceded it cannot do directly? If failure to provide machinery for taxing one kind of property, while ample machinery is given by which to tax another kind, is constitutional, any omission to impose upon officials the duty of taxing all property uniformly and without discrimination would be unassailable in the courts.

We venture this criticism of this opinion with less hesitancy than we otherwise would, had not the learned court itself expressed its own want of satisfaction in the conclusions reached. It seems to us that the honorable and learned court permitted itself to be jostled from the legal highway by reason of the dire and serious consequences which seemed to crowd around the decision adverse to this law, and which they seemed to apprehend would likely interfere with the entire system of taxation in the state.

In the case at bar, however, the system of taxation of the territory is not involved, but the law under discussion is, in our opinion, in conflict with the organic act of the territory which forbids *in hæc verba* discrimination. Ample machinery existed for the taxation of real as well as personal property, but was authorized under this act to leave the real property untaxed while taxing the other.

It is proper to say that the judgment of this court only reverses this case as to the local tax on the ground that it is taking private property for private uses, but holds the territorial tax to be valid, for the reason that they regard it as levied for a public purpose, and not a discrimination within the meaning of the organic act.

Hence what we have said in regard to territorial tax, the reasoning of which holds said tax invalid, is in the nature of a dissenting opinion on our part. The case is reversed. All the justices concurring.

TRIPP, C. J. I concur in so much of the foregoing opinion as declares the tax for local purposes invalid, but I cannot yield assent to the reasoning or conclusion arrived at by the learned judge, whereby he holds the territorial tax as contravening the provisions of our organic act, which prohibits "any discrimination in taxing different kinds of property." The language of the section is: "In addition to the restrictions upon the legislative power of the territories, contained in the preceding chapter (§ 1851), the legislative assemblies of Colorado, Dakota and Wyoming, shall not pass any law impairing the rights of private property, nor make any discrimination in taxing different kinds of property; but all property subject to taxation shall be taxed in proportion to its value." § 1925, R. S. U. S. This provision is unlike any thing to be

found in the constitution of any of the states. It is first found in the organic act of Colorado, enacted February 28, 1861, and carried into our organic act, March 2, 1861, and was subsequently included in the Wyoming act, July 25, 1868. It is not found in the organic act of any of the other territories.

As early as 1787, the Confederate congress, in establishing a government for the North-western Territory, provided that "no tax shall be imposed upon the property of the United States," and in no case shall non-resident proprietors be taxed higher than resident. This provision was carried into the organic law of Missouri Territory (§ 6), in 1812, and the organic law of several of the older territories. In 1838, in enacting the Wisconsin organic law, which seems to have been the model for subsequent territories, this section was changed so as to read: "No tax shall be imposed upon the property of the United States, nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents." Wisconsin Organic Act, § 6. And this section, which enlarged the prohibition forbidding lands of non-residents to be taxed higher than those of residents, so as to make it include all property of non-residents, was re-enacted *verbatim* in nearly all the territories subsequently organized. In the Iowa organic act, June 12, 1838; Minnesota, March 3, 1849; Utah, September 9, 1850; Kansas and Nebraska, 1854; Dakota and Colorado, 1861; and by R. S. U. S., § 1851, it is made a part of the organic law of all the territories. This was the only provision of the organic laws of the older territories in relation to taxation; and outside of the territories of Dakota and Wyoming it is the only provision limiting legislation as to taxation, except in the Territory of Washington, which contains the clause: "And all taxes shall be equal and uniform, and no distinctions shall be made in the assessments between different kinds of property, but the assessments shall be according to the value of the property" (§ 1924, R. S. U. S.) — which clause is included with a great number of other restrictions contained in that section upon legislation as to currency, etc., and which provision bears striking resemblance to the constitution of many of the states, and resembles our statute only in that part as to assessment of taxes. No reason is given by congress, in its debates or



otherwise, why this provision of our organic law, found in section 1925, as to "discrimination in taxing different kinds of property," should be made applicable to the three territories of Colorado, Dakota and Wyoming alone. Nor does it appear from whence the language or wording of this section was derived. It is quite unlike the language used in any of the constitutions of the states, and was not carried into the constitution of Colorado when she entered the Union as a state. In her state constitution she adopted the provision found substantially in a number of the modern constitutions where limitation has been sought to be placed upon the power of the legislature over taxation. The provision of her constitution is as follows: "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax," etc. Article 10, § 3, Const. Colo. Nor does there appear to have ever been any construction of this section by Colorado or Wyoming, and this is the first time to our knowledge that it has been before the courts of this territory. The language is not unlike that used by the judges in determining the effect of those provisions of modern constitutions relating to uniformity and equality of taxation.

What is meant by the clause prohibiting a "discrimination in taxing the different kinds of property." Does it mean, as claimed for it by the learned judge in the foregoing opinion, such a uniform system of taxation as that when any property within the taxing district is made subject to taxation all other property within the district must be equally so subject? Let us examine the section. It does not in terms require either a uniform rule or rate of taxation; it prohibits a discrimination. This word cannot have a literal rendering. All laws are open to the objection of discrimination, and sometimes even of unjust discrimination. Laws providing for levy and collection of taxes discriminate when property by intention or mistake escapes taxation. So, also, in case of local assessment for sidewalks and municipal improvements; license taxes upon business; taxes upon dogs; errors in valuation, whereby property in one locality is assessed at a higher price or at a higher rate than in another, where personal property tax is made a lien upon real property; and some of them, perhaps, are an unjust discrimination, yet no one seems to think they avoid the taxes



collected under such laws, or that the statute is open to the constitutional objection here raised. Taxation of property always requires the exercise of judgment and of a careful discrimination. Taxation of the different kinds of property without discrimination, (using the word in its popular sense), would lead to the very error, and produce the very mischief, congress has sought by this provision to prevent.

Discrimination cannot mean uniformity of taxation, for laws establishing a uniform rate or rule may unjustly discriminate in favor of or against other property of the same class. A law which taxes all farms at the same price, which fixes the value of every acre of land, every horse, every cow, and every article of each class of personal property at the same sum for purposes of taxation, would be uniform; but who would not say at once that such a system was an unjust discrimination; yet, to correct such a wrong, the injured party must seek his redress from the legislature, and not from the courts. Says Judge COOLEY, in *Youngblood v. Sexton*, 32 Mich. 406, where it was objected that similar taxation was not uniform: "The objection to a want of uniformity is wholly misplaced here. Uniformity is the very basis of this tax. It is levied entirely without discrimination; and the real objection to it is, not that it lacks uniformity, but that the legislature were unjust in making it uniform, instead of levying it by some standard of discrimination. The objection presents a case of misapplication of terms. It is also presented to the wrong tribunal."

To avoid such a uniformity congress has prohibited discrimination, which must be construed to mean unjust discrimination; a discrimination in favor of one kind of property as against another; a discrimination which prevents each kind of property subject to taxation from bearing its fair and equal share of the burden imposed upon all. In this sense the words are aptly chosen; in any other they are meaningless, and lead to absurd results. Under this construction we are free from many of the perplexities in which courts have found themselves in determining whether laws which were not discriminating were uniform. The disjunctive clause with which this provision is connected further limits and explains it; standing alone it might be construed to mean that all property of every kind must be taxed equally, without discrimina-

tion ; but the words "subject to taxation," limiting the words and clause of which they form a part, extend their limiting power to the principal clause, which the disjunctive clause itself limits, so that the meaning of both, construed together, is that there shall be no unjust discrimination in the taxation of the different kinds of property subject to taxation, but all such property shall be taxed in proportion to its value. These words, "subject to taxation," are of importance in the construction of this section ; without them, all property would be subject to taxation ; with them, only certain property is liable to taxation.

Who is to determine what property is "subject to taxation ?" The courts cannot determine. It is a legislative function. It can only be exercised by the legislature or by congress. Congress has not seen fit to exercise it, but has given to the legislature the absolute control over "all rightful subjects of legislation," saving and reserving to itself alone the right to modify or annul the same. This certainly is a rightful subject of legislation, and it follows that congress has given to the legislature the right to apportion and subject property to taxation.

The legislature, then, has a right to say what property shall be subject, and what shall not be "subject to taxation ;" what property shall be taxed, and what property shall be exempt from taxation — limited only by the provision that all property so subject to taxation shall be taxed without unjust "discrimination" in favor of one kind of property as against another, so that every kind of such property shall be taxed in proportion to its value.

Without the limitations contained in sections 1851 and 1925, R. S. U. S., under the general legislative power granted this territory, the legislature would have absolute control of the subject of taxation. It could arbitrarily say what property should bear the burdens of taxation, and what should escape. It could, perhaps, unjustly discriminate in favor of the rich as against the poor, and in favor of one class of property as against another, irrespective of the public good or the future benefit to be derived therefrom, except in so far as it would be restrained by the provision of the federal constitution itself. Great powers were given legislatures under the earlier constitutions of the states, and in some those powers are still retained ; but the people have grown restless

under taxation laws which favor the few as against the many, and unjustly discriminate in favor of one class as against another, and have sought to remove from the influence of the lobby and the trade of legislation the right to exempt property from its proper share of the public burden. In many of the states all property is subject to taxation except as exempted in the constitution itself. This is the case in Ohio, Indiana, Minnesota, Virginia, West Virginia, North Carolina, South Carolina, Tennessee, California, Nevada, Colorado and Florida. In some the people have contented themselves with providing in their constitutions that "taxation shall be equal and uniform throughout the state," as in New Jersey, Pennsylvania, Michigan, Wisconsin, Kansas, Missouri, Arkansas, Texas, Oregon, Georgia and Louisiana; while in others, of the older states, the legislature is still unrestricted in its power over the question of taxation. Our organic law is more like the constitutions of those states wherein the legislature is not restricted as to exemptions, except in so far as that taxation must be equal and uniform. Since congress has not attempted to designate what property shall be subject to, nor what shall be exempt from, taxation, we shall be little benefited by the examination of the decisions of those states whose constitutions enumerate the classes of property which are exempt. Nor are we fettered by the rule of uniformity which has led to such learned and protracted discussions by the courts in sustaining laws admittedly wise and without unjust discrimination, but which seemed obnoxious to the objection that they were not uniform. As we have seen, laws which are uniform may unjustly discriminate, and the converse is equally true, that laws which do not unjustly discriminate may not be uniform.

Is this law open to the objection that it unjustly discriminates in taxing different kinds of property? The act was approved March 12, 1885, and is made an amendment of section 17 of the Revised Law of 1877, amending that section to read as therein provided. It consists of three sections, the first of which provides: "All personal property is to be listed, assessed and taxed in the county where said property may be situated and kept on the 1st day of April of the then current year." \* \* \* Section 2 provides: "When any personal property is situated and

kept in any unorganized county of this territory, then such property shall be subject to taxation in the nearest organized county thereto, and shall be listed and assessed by the assessor of said nearest organized county; and when said unorganized county borders upon two or more organized counties, then said property shall be assessed and taxed in that organized county having the greatest extent of contiguous boundary line." And the third section provides a penalty for violation of the requirements of the act. Section 17, before amendment, read as follows: "All personal property is to be listed, assessed and taxed in the county where the owner resides on the 1st day of January of the then current year, or where the property is kept. But if the owner resides out of the territory, it is to be listed and taxed where it may be at the time of listing." One of the changes sought to be made by this new statute was to fix the *situs* of personal property for taxation. As the law existed prior to 1885, personal property could be taxed either where the owner resided, where he was when it was listed, if a non-resident, or where the property was kept. Under the law of 1885, the *situs* of all personal property is where it is situated or kept. This change relieved from taxation a large class of personal property, which had prior thereto been taxed to residents of the organized counties, and to non-residents where listed. To obviate this objection, and not to release property already subject to taxation, as well as to make the large herds of cattle kept in the unorganized counties bear and continue to bear their fair share of the expenses of government, section 2 of the act was made to provide a means of collecting such tax. No complaint had ever been made of the workings of the law of 1877, which substantially had been the law long prior thereto. No citizen of the organized counties, or other person owning stock or other personal property in the wild country west, divided by imaginary lines into what are termed "unorganized counties," had ever complained of paying not only territorial, but local, taxes upon the property so owned by him. But under the amendment a new class of tax payers was reached; not only the personal property of persons residing without the unorganized counties, but that of persons residing within the unorganized counties, is subjected to taxation; and it is one of these individuals that is the complainant here; and his com-

plaint is not that he is taxed too much, but that he is not taxed enough; that when the government taxed his personal property it should also have taxed his real property. It is, to say the least, a remarkable case of unjust discrimination.

Is the law, then, which reaches out and seeks to tax the personal property within the unorganized counties, open to the objection that it is unjust "discrimination in taxing different kinds of property?" The court cannot shut its eyes to the fact known to all that the western prairies are a vast cattle range, covered with thousands of cattle of great value, whose owners ought in good right to bear a fair share of the burdens of taxation, necessary in the enactment and enforcement of the laws to which they look for the protection of their property. Is it an unjust discrimination to make all the cattle on a given range subject to taxation under the law of 1885, rather than a select number, as under the law of 1877? All tax laws are necessarily harsh and arbitrary; there can under no system of government be an entire freedom from unjust discrimination, but the entire scope and result of a system of taxation must be considered, rather than a literal and exact rendering and construction of a word or phrase of the statute providing it.

I think this law is not open to the charge of an unjust discrimination, and that it may be sustained upon either of two grounds: (1) That it was a providing of the machinery for collecting taxes on property subject to taxation; (2) an allowable exemption of real property within the unorganized counties.

The law of 1877 provided for seventeen distinct exemptions of property, and provided that all other property should be subject to taxation, and this, with a few modifications, has been the law since 1862,—more than a quarter of a century. Congress has had before it the laws of each session of our legislature containing these provisions, and the amendments made thereto from time to time, and it has neither disapproved nor modified them. They have therefore, within the rule laid down by the supreme court of the United States, received the implied sanction of congress. *Clinton v. Englebrecht*, 13 Wall. 434.

No one during all these years has ever questioned the constitutionality of the law allowing these exemptions, though various

questions of taxation have been heard and determined in the lower courts, some of which have been carried to the supreme court of the United States; yet it has been tacitly admitted during all these years, notwithstanding all the diligent research of counsel in preparation of cases raising various questions as to the validity of our statutes on taxation, that the exemption of enumerated property to each citizen; of all the property of certain infirm and indigent; of all property of charitable and benevolent institutions, and of lands whereon are grown trees, and are placed other improvements of benefit to the people at large, — was not an unjust “discrimination in the taxing of different kinds of property.” It is true that no length of time except by limitation of law, and no mere submission to or failure to question a statute, are proof to a court of its invalidity; but the circumstances connected with the execution of a law whose validity is attacked long subsequent to its enactment may be taken into consideration by the court upon the theory that if so glaring a constitutional defect existed, as is here now claimed for the first time, some of these logical gentlemen in the examination of kindred questions, or the courts in determining the same, would probably have suggested its existence. If it is a discrimination to tax the personal property within the unorganized counties, and leave untaxed the real property, it was a discrimination to tax a portion of the personal property, and to leave the balance untaxed under the law of 1877; or, if that can be excused on the ground that the *situs* of the property was made to follow the owner, it was certainly a discrimination to tax the man who lived in the organized county to the full limit of the law, and to omit to tax his wealthier neighbor who happened to live just across the line in an unorganized county.

If it is conceded that the failure to provide machinery for the collection of any tax within the unorganized counties can excuse such apparent discrimination as the learned judge in the principal opinion seems to admit, I cannot understand by what logic the providing of the machinery to collect a part of it is a discrimination, or how a man can be heard to complain in a court that he is unjustly discriminated against, when he has paid taxes on his cattle, in that he has not been required to pay taxes on his farm. It was a part of the code of morals sought to be established by our



Saviour that if they smite you on one cheek, you must turn the other also ; but the rule has never so far before found its way into the legislation of our country as to be attempted to be enforced by the courts. It occurs to me that if the legislature has permitted property to go untaxed in the unorganized counties, and thereby the burden has been increased upon those in the organized counties, and thereby it has unjustly discriminated against certain kinds of property and in favor of others, when it takes one step in the direction of lifting that burden by taxing personal property it is not a step toward discrimination. If so, when it advances the other step, and taxes all property in the unorganized counties, discrimination would be complete. And if it was not a discrimination to fail to collect any tax on any property in the unorganized territory, I cannot see how it is a discrimination to fail to collect it on a part. Certainly the greater is presumed to include the less, and if it was not unjust to allow the whole to escape taxation, I cannot see how it is unjust to allow the part. But it is said that when you commence taxing in a district you must tax every thing subject to taxation ; that when any tax is levied in an unorganized county, you must levy it upon all property. There are no taxing districts for the territorial tax ; its district is the entire territory, and the machinery by which this tax is collected is found in the local organization of the counties. If this position be correct, that it is only necessary to neglect to tax all property in a given district to make the taxation valid, then the territorial tax could be abated in any organized county, so that it is abated on all property. This cannot be true. It would be an unjust discrimination, an arbitrary and illegal exemption. The failing to provide machinery to collect the territorial tax in unorganized counties can only be excused upon some good ground presumed to exist. The presumption is in favor of the law ; and it will be presumed that the legislature is advancing the machinery for collection of taxes upon property in the outlying territory as fast as it will pay to do so. It would be bad legislation to provide for the assessment of a tax yielding \$1,000, which would cost \$2,000 in its collection. Such legislation and such taxation would be an unjust discrimination against those required to pay the extra and unnecessary expense.



The cost of collecting taxes upon real property is slower and much more expensive than that upon personal property, which can be removed and exposed for sale by distress. Besides, there is little real property in the unorganized counties to which the settlers have acquired title; and it is presumed that when in the judgment of the legislature, the ends of justice will be best subserved with least discrimination against the property-owners and tax payers by providing for collection of taxes upon the real property of unorganized counties, it will be done. This court will be justified in setting aside the laws of the legislature only when it can plainly see, under any view that can be taken of the law, that it is clearly in violation of the organic act. If we were in doubt even of the validity of the act, such doubt must be resolved in favor of the law; *a fortiori*, when the court is unable to see how any class of citizens, or any class of property has been unjustly discriminated against by this act, it will not go into the realms of speculation for some possible organic defect. Were the case one of uniformity as to the rule of taxation, as in Wisconsin, or the rate of taxation, as in Kansas, under their constitutions, we might well pause, and in the language of the learned judge who delivered the opinion of the court in *Railroad Co. v. Taylor*, 52 Wis. 42, 8 N. W. Rep. 833, say: "It is well to move slowly, and, if possible, with fixed sandals, and upon no slippery pathway." Yet that learned court held in the case just cited, under a constitution providing that "the rule of taxation shall be uniform throughout the state," that the legislature had the power to exempt the plaintiff railway for a term of years from all taxation; and in Kansas, under a constitution that provides that "the legislature shall provide for a uniform and equal rate of assessment and taxation," her court held valid a statute which provided that real property only of that part of the town set off and annexed to another town should be liable for its proportion of the debt of the old town from which it was severed. *Commissioners v. Nelson*, 19 Kan. 234. The party whose real property had been assessed for a tax to pay this debt, complained that such a law was not uniform and equal under the constitution; that owners of personal property should be also taxed for this purpose. It would seem difficult to sustain such legislation

under such a constitutional provision ; and the court, admitting the difficulty of its position, says : “ To say that all assessments and all taxes must be equal and uniform in order to be valid ; that the tax in this case is not equal and uniform, and therefore that the tax in this case is void — is an argument so short, so simple, so logical, and so easy of comprehension, that all persons who cannot or will not push their inquiries into a broader field of investigation, will gladly accept it as true and think it conclusive.” And the court then proceeds to argue that the words of the constitution cannot have a literal construction ; that there underlies all such instruments a principle which the court in its interpretation is bound to respect ; and then continues to show the lack of unjust discrimination in the act, and that it is within the spirit and meaning of the constitution. We are met with no such obstacles here. Our organic law does not require the law of taxation to be uniform either in rule or rate. It embodies the very principle invoked by these learned courts as concealed in or lying back of the wording of their organic laws. In my judgment, the failure of the legislature to provide the machinery for collection of the tax on real property within the unorganized counties did not invalidate the tax collected for territorial purposes on personal property.

Again, if this legislation is to be interpreted as an exemption of the real property within the unorganized counties, I have no doubt of the constitutionality of such legislation. When it is once admitted that the legislature has power to exempt property from taxation, the most difficult obstacle has been overcome. The only limitation upon such power of exemption is that it shall not work an unjust discrimination as against other property. Why, under such an interpretation of the statute, might not the legislature have exempted all the real property in the unorganized counties in terms, so long as they remain unorganized ? There is no local government to maintain, no discrimination is made except as against the territory and the tax payers of the organized counties ; and if it appear that in the present or near future the entire territory may be benefited by such a provision of taxation, then no discrimination is made as against them. Such exemptions are presumed to be for the public benefit. The United States, upon

this theory, not only offers her homesteads free to the settler, but exempts them from all debts contracted by him prior to issue of patent. The settler who pushes out over the frontier line into the unsettled country is generally poor, and the inducement offered him of free lands, coupled with exemption from taxation during the period of early settlement, might benefit the entire territory by hastening an early opening and development of the unorganized county, which, but for such inducement extended, might long remain unoccupied, and might fail to bring into the treasury any revenue from taxation for a much greater length of time. Such laws are continuously sustained by the courts. Exemptions of property for manufacturing purposes have always been sustained wherever the legislature has the power to exempt; the presumption being that they contribute to the general public benefit. *Factory Co. v. Inhabitants of Gardiner*, 5 Me. 133; *St. Joseph v. Railroad Co.*, 39 Mo. 476; *Brewster v. Hough*, 10 N. H. 138; *Tomlinson v. Jessup*, 15 Wall. 454; *Hospital v. Philadelphia Co.*, 24 Pa. St. 229.

In general, the exemption must be of a class, and not of an individual of a class; and under every statute there must be some good reason for the exemption, otherwise the legislation will be open to the objection of unjust discrimination; any arbitrary and invidious exemption of a person or class will be void. No good reason appears to me, if the legislature intended by this act to exempt all real property from taxation in the unorganized counties for the public benefit, such as the encouraging of emigration, why the law is not as valid a one as that exempting a class of manufacturers engaged in a certain line of work from exemption for a term of years. It is in some respects less objectionable in that no period of time is fixed for the expiration of the exemption, and the benefit is one more general to the entire people than in case of the manufacturer. The right to exempt such persons and corporations in states where the right of exemption is not restricted, is so general a one that it long ago ceased to be challenged, and the supreme court of the United States, and certain of the supreme courts of the states, have carried the doctrine so far as to hold that in case of charters and franchises accepted with such exemption, without right of revocation by the state, it be-

comes a contract which binds future legislatures. Says Judge BRADLEY in *Salt Co. v. East Saginaw*, 13 Wall. 376: "It is unnecessary at this time to discuss the question of power on the part of a state legislature to make a contract exempting certain property from taxation. Such a power has been frequently asserted and sustained by the decisions of this court." Citing *New Jersey v. Wilson*, 7 Cranch, 164; *Gordon v. Appeal Court*, 3 How. 133; *Bank v. Knoop*, 16 id. 369; *Dodge v. Woolsey*, 18 id. 331; *McGee v. Mathis*, 4 Wall. 143, and others.

This doctrine has, however, been denied by many of the states, and it has been vigorously maintained that no legislature has the right to tie up and bind future legislatures as to the revenue of the state. As late as 1878 the legislative assembly of the District of Columbia passed an act exempting from taxation, for ten years, such real and personal property as might be actually employed within the district for manufacturing purposes. Under subsequent legislation by congress all real estate in said District was made liable to taxation, except property of the United States, the District of Columbia, and that used for educational and charitable purposes; and it was claimed by Welch, a manufacturer who had made large investments under the former law, that it was a contract which subsequent legislation could not impair. The question was also raised as to the power of the District legislature to pass such an act. Justice HUNT, in delivering the opinion of the court, says: "It is not open to reasonable doubt that congress had power to invest, and did invest, the District government with legislative authority, or that the act of the legislative assembly of June 26, 1873, was within that authority. We shall therefore consider the question as if that act exempting manufacturing property from taxation had been passed directly by congress. It does not create a contract in the sense that it cannot be repealed. It has been frequently held that the incorporation of a company by special charter, with the exemption of its lands or other property from taxation, creates, upon the acceptance of the charter, a contract which will insure that exemption during the period specified. But the present case does not come within the rule. This is a bounty law, which is good as long as it remains unrepealed; but there is no pledge that it shall not be repealed at any time."

Welch v. Cook, 97 U. S. 542. If it is conceded that the legislature may exempt forty acres or a quarter section of land from taxation, which has grown thereon a certain number of trees, no reason appears why it may not exempt wild land in the unorganized counties for a limited time to the settler who takes it up and makes improvements thereon.

Nor is the legislation open to the objection that it is local or special. It is not local because it applies to the unorganized counties, and not to the whole territory in name. It does apply to the whole territory in that the proposition is open to the people of the whole territory who desire to avail themselves of its provisions, and the benefit to be derived from the early settlement of the new country is to be shared in by the whole territory. The same objection could be urged to mills and manufactures, which must be confined to rivers and streams of water, or to exemption of agricultural lands for planting timber. because it does not apply to cities and incorporated towns.

The term "unorganized counties" is not one of place or location; it is one of class. What is unorganized to-day may be organized to-morrow, and counties and portions of counties now organized may again become unorganized. The law regards the future, not the present alone, nor the past. Legislation based upon the population of cities and towns, when prospective in operation, is always held not to be special or local; and why should this legislation based upon organization, which rests largely upon population, be any more open to such objection? By local or special is meant local or special in its effect or operation.

In either view of the case, the law, so far as it provides for the collecting of a territorial tax assessed upon personal property in the unorganized counties, is valid, and must be sustained; but in so far as it seeks to provide for local taxation to be expended for the sole benefit of a county foreign to that wherein the property is situated, it is illegal and void. The cause must be remanded for further proceedings in accordance with the opinion of this court. All the justices concur, except Justice THOMAS, who dissents.

ST. CROIX LUMBER Co., Appellant, v. MITCHELL ET AL., Respondents.

**Statutes — Construction — Mechanics' Liens — Sub-contractor — Notice to Owner.**

Where at the time a contract was entered into for the construction of a building, a sub-contractor, to acquire a lien, was, under § 656, C. C. Pro., required to give the owner of the property notice of his intention to furnish materials, but before the materials were furnished the law was changed, dispensing with notice, (§ 1, chap. 84, L. 1883), *held*, that the change affected the remedy merely and that the sub-contractor could acquire a valid lien without the notice required at the time the construction contract was entered into.

(Argued and determined at the May Term, 1889.)

**A** PPEAL from the district court, Brown county; Hon. L. K. CHURCH, Judge.

This was an action by the St. Croix Lumber Company against L. C. Mitchell, C. H. Hatch and Wm. Tenant to foreclose a mechanic's lien.

The case was tried by the court and it made the following findings: That on the 6th day of January, 1883, the firm of S. S. Pratt & Co. entered into a written contract with Chisholm Bros. & Gunn to erect a flouring mill and commenced the erection thereof soon thereafter; that before its completion said Pratt sold his interest in the mill and contract to his copartners, Mitchell and Hatch, and they sold an interest therein to the defendant Tenant; that at various times between April 30 and September 1, 1883, the plaintiff delivered to said Chisholm and others, contractors, lumber to the amount of \$567.38, to be used in the erection of said mill and the same was so used under said contract and that said amount was due and had not been paid; that within sixty days after furnishing said lumber the plaintiff caused a lien to be filed therefor in the office of the clerk of the district court of Brown county as provided by chap. 31, C. C. Pro., that no collateral security had been taken by the plaintiff for the payment of said debt; that the said contract between the said Pratt & Co. and said contractors was entered into while section 656, C. C. Pro., as amended by chap. 94, L. 1881, was in force; that no notice as provided by that section was ever given these defendants, said

Pratt & Co., their agents, or any of them, by the plaintiff, of its intention to furnish materials for the erection of said mill, and that none of said parties had any knowledge that this plaintiff had furnished said contractors any material used in said mill until long after it had been furnished and at or about the time said lien was filed; that at the time said Pratt & Co. and these defendants learned there was any thing due this plaintiff for materials, they had fully paid said contractors all that was due them in the sums and at the times provided in said contract of January 6, 1883. The court found as a matter of law that the plaintiff was "charged with notice of the terms of said contract;" that it "could not acquire a lien as sub-contractor without complying with the law relating to such liens as it existed at the time said contract was made;" that the plaintiff was not entitled to a foreclosure of its lien.

From a decree entered dismissing plaintiff's action it appealed to this court.

The provisions of the statutes involved will be found in the head-note.

*Skillman & Mott*, for appellant.

The statute in force at the time the materials were furnished controls. *Bohn v. McCarthy*, 11 N. W. Rep. 127; *Phillips*, 94. The change in the law affected the method of fixing the lien applied to the remedy merely. *Phillips*, pp. 31, 38; *Hauptman v. Callin*, 20 N. Y. 247; *Paine v. Woodworth*, 15 Wis. 298; *Gross v. Eden*, 53 id. 546; *Gordon v. South F. C. Co.*, 1 McAll. 513; *Edwards v. McCaddon*, 20 Ia. 520.

*Jenkins & Campbell*, for respondent.

The construction contended for the statute of 1883 would render it unconstitutional as affecting vested rights. Notice was indispensable to the lien. Respondents could unquestionably perform the contract before notice of any claim. A sub-contractor is bound by the original contract. *Stewart v. Wright*, 52 Ia. 335; *Wells v. Calhn*, 51 Cal. 423; *Renton v. Conley*, 49 id. 185; *Bowen v. Aubrey*, 22 id. 566; *Phillips*, §§ 62, 63, 64, 65; *Sullivan v. Brewster*, 1 E. D. Smith, 681. A law which amounts to a denial of



rights accruing under a contract, though professing to act only on the remedy, is obnoxious to the constitutional provision. Phillips, § 26; O'Neil v. Anderson, 26 Minn. 329, 4 N. W. Rep. 47; Donahy v. Clapp, 12 Cush. 440; Blauvelt v. Woodworth, 31 N. Y. 285; Bronson v. Kinzer, 1 How. 311; McCracken v. Haywood, 2 id. 608; Hallibert v. Porter, 11 N. W. Rep. 84. Respondents did what their contract required, and what, under the law, they would have been compelled to do. This is sufficient. See Bass v. Williams, 41 N. W. Rep. 229; McAlpin v. Duncan, 16 Cal. 126; Knowles v. Joost, 13 id. 620; Robbins v. Blevins, 109 Mass. 219.

By the COURT:

This case is reversed upon the ground that the law of 1883, which repealed the statute of 1877, in so far as it required notice to be given to the owner of the premises, affected the remedy only, and the court below erred in holding such notice essential to the validity of the lien for materials furnished after the passage of such law. All concur except AIKENS, J., dissenting.

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DODGE ET AL., Respondents, v. FURBER, Appellant.

**Pleading — Sufficiency — Justice Court — Frauds, Statutes of.**

Where in a justice's court the plaintiffs declared on a promise of the defendant to pay the balance due on a note from one H., if they would deliver to defendant certain negotiable paper H. had left with them as security for the payment of said note, and the defendant answered that he had never given any "written guarantee" to pay said note, and any verbal promise so to do "was merely done in jest," *held*, the answer was frivolous and that the justice properly rendered judgment for the plaintiffs on the pleadings. *Held, also*, that the complaint alleging the deposit of the securities for the purpose above stated by H., the agent of the defendant, defendant's promise to pay the balance due on said note within a reasonable time if plaintiffs would deliver said securities to him, the delivery of the securities, and that he had not paid the same within a reasonable time though requested so to do, states a good cause of action.

(Argued and determined at the May Term, 1889.)

**A** PPEAL from the district court, Grant county; L. K. CHURCH, Judge.

This was an appeal from a judgment of the district court affirming the judgment of a justice of the peace rendered on the plead-

ings. The plaintiffs Allan C. Dodge and Walter B. Saunders, partners in business under the name of the Merchants' Bank, in their complaint alleged that D. P. Hall, the agent of the defendant Charles M. Furber, executed to them his (agent's) promissory note for \$200, with interest thereon at the rate of 12% per annum, and to secure the payment thereof deposited with them "a quantity of valuable negotiable paper;" that afterward in November, 1883, the said defendant informed the plaintiffs that he was the owner of said securities and requested the delivery thereof to him; that he then and there promised to pay the balance due on said agent's note within a reasonable time if the said securities were delivered to him; that relying upon said promise they delivered the securities to him; that the balance due on said note was \$83.38; that the defendant had refused to pay the same though frequently requested so to do. The plaintiffs commenced this action in September, 1884. The defendant for answer admitted the giving of the note and the depositing of the securities by the agent, but alleged that he, the defendant, owned the securities, and that they have been deposited with the plaintiffs without his knowledge or consent, and without the authority of the said agent, who held them for collection merely, and on condition that all that were not collected should be returned to him; that he informed the plaintiffs of his ownership of the securities, and the want of authority of the agent to hypothecate them; that he demanded them from the plaintiffs, and they complied with said demand. The answer then set up the following: "Defendant denies that he ever gave plaintiffs any written guarantee to pay, or cause to be paid, any balance due plaintiffs from said D. P. Hall on said two hundred dollar note; any oral or verbal promise to do so was merely done in jest, and without any valuable consideration therefor, and denies that he got possession of said negotiable papers by legally obligating himself, the defendant, all of which was known to plaintiffs herein at the time, to pay or cause to be paid any balance due on said note given by said Hall to the plaintiffs herein, and defendant denies that he owes plaintiffs any sum of money whatsoever by any agreement on his part or otherwise." Then followed a prayer of dismissal.

On the filing of this answer the plaintiffs moved for judgment

on the pleadings "on the grounds that the answer is frivolous, and does not set forth facts sufficient to constitute a defense, and contains no denial of any material allegation of the complaint." The justice granted the motion, "and the defendant having elected not to amend his answer," the justice rendered judgment against him according to the prayer of the complaint. The defendant appealed to the district court and the justice's judgment was affirmed, whereupon he appealed to this court.

*E. M. Bennett, A. B. Melville and Campbell & Barnes*, for appellant.

The complaint does not state facts sufficient to constitute a cause of action. The promise to pay Hall's debt was not in writing. §§ 920, 1653, C. C.; *Dows v. Swett*, 120 Mass. 322; *Richardson v. Robbins*, 124 id. 105; *Grover v. Stuart*, 40 Mich. 747; *Tozer's Estate*, 46 id. 299; *Krutz v. Stewart*, 54 Ind. 182; *Weisel v. Spence*, 59 Wis. 304; *Jackson v. Rayner*, 12 Johns. 291; *Watson v. Randall*, 20 Wend. 204. The papers belonged to the defendant, and it was the plaintiffs' duty to surrender them as soon as apprised of the fact. §§ 977, 978. There was, therefore, no consideration for the promise. *Clapp v. Webb*, 52 Wis. 642; *Mallory v. Gillett*, 21 N. W. Rep. 428; *Deacon v. Gridley*, 15 C. B. 295; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Reynolds v. Nugent*, 25 Ind. 328; *Connover v. Stilwell*, 34 N. J. L. 54; *Mallalieu v. Hodgson*, 16 Ad. & El. (N. S.) 689; *Billings v. Filley*, 32 N. W. Rep. 573; *Withers v. Ewing*, 40 Ohio St. 408.

There was a denial that defendant owed plaintiffs. This was sufficient to prevent the rendition of judgment on the pleadings in a justice's court. *Lange v. Hook*, 7 N. W. Rep. 839; *Haight v. Arnold*, 12 id. 680; *Van Dorn v. Tyader*, 1 Nev. 380; 1 *Estee*, 402.

*B. A. Dodge and R. B. Tripp*, for respondent.

There was no issue of fact. The answer presented no denial, defense, or counter-claim within section 23, Justices' Code. Plaintiffs' motion was properly granted. Defendant's promise was an original one. §§ 920, subd. 2, 1653, subd. 3, C. C.; *Deerings*, C. C., § 2794, subd. 3, n.; *Farley v. Cleveland*, 4 Cow. 432; S. C., 9

id. 639; Meech v. Smith, 7 Wend. 315; Mallory v. Gillett, 21 N. Y. 412; Baker v. Bradley, 42 id. 316; Dyer v. Gibson, 16 Wis. 557; Fitzgerald v. Minessey, 15 N. W. Rep. 233; Weisel v. Spence, 18 id. 165; Kelley v. Schupp, 60 Wis. 76; Ames v. Foster, 106 Mass. 403; Fullam v. Adams, 37 Vt. 403; Brownwell v. Harsh, 29 Ohio St. 631; Nugent v. Wolse, 4 Atl. Rep. 15.

The object was to get the property back, and the amount to be paid to effect it was evidenced by Hall's note. Being negotiable instruments, the plaintiffs got title upon the deposit, so there is no force in the argument of a want of consideration.

While oral pleadings in a justice's court are treated with liberality, the rule does not apply when parties appear by attorneys, and reduce their pleadings to writing. In such case their sufficiency is determined by the rules applicable in courts of record. Maynard v. Tidwell, 2 Wis. 34. Compare Justices' Code, §§ 21, 23, and C. C. Pro., §§ 111, 118. Under these rules and the facts presented, the judgment ought to be affirmed.

By the COURT :

This case is affirmed, the court being of opinion that the complaint was sufficient, and that the answer was frivolous. The plaintiffs' motion for judgment was, therefore, properly sustained. All concur.

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WALLACE, Appellant, v. SWAN, Respondent.

**Attachment — Liens — Priority.**

E. attached certain property and the debtor claimed it as exempt; the officer, however, held the property under the writ. During this time W. attached it on a debt against which it would not be exempt. After this, the debtor waived his exemptions on E.'s attachment; *held*, E. had the superior lien.

(Argued and determined at the May Term, 1889.)

**A**PPEAL from the district court, Grand Forks county; Hon. CHAS. F. TEMPLETON, Judge.

This was an action by Sumner Wallace, plaintiff, against James K. Swan, defendant, as sheriff, to recover \$850.55, alleged to have been realized by defendant on the sale of certain property plaintiff had previously caused to be attached.

It appears the plaintiff was a creditor of one J. W. Bowes; that he commenced an action against him and caused an attachment to be issued and levied by the defendant, Swan, upon certain property of Bowes, February 3, 1887; that in that action he recovered judgment against Bowes for \$1,248, October 7, 1887; that in the judgment it was found and adjudged that the debt upon which it was rendered was for property that had been obtained under false pretenses.

It also appeared that the defendant, as sheriff, had attached the same property on the 28th day of January, 1887, in a suit in which the Estey Organ Company was plaintiff, and said Bowes was defendant; that on the same day, Bowes, through his wife, he having absconded the territory, claimed the property as exempt; that notwithstanding the claim, the sheriff continued to hold possession of the property under the writ; that on the 14th day of February, 1887, the exemption claim was waived and consent was given by the wife that the property should be subject to the attachment and execution of the organ company; that on the 2d day of March, 1887, the organ company recovered a judgment against Bowes for \$1,125; that on the same day an execution was issued on the judgment to the defendant sheriff, and he sold the property thereon for \$850.55.

The case was tried by the court without a jury, and having found the above facts, it dismissed the plaintiff's action. After the denial of a motion for a new trial and the entry of final judgment the plaintiff appealed.

Plaintiff's debt having been incurred under false pretenses, it was conceded under section 3, chapter 55, L. 1885, he was entitled to the proceeds of the sale in the event of the first levy's being invalid, or its lien having been done away with by the exemption claim.

*C. B. Pratt*, for appellant.

Claiming the exemption destroyed the first attachment lien, the property then became liable to appellant's levy. *Thomp. Homes. & Ex. 833.*

*Bosard & Corliss*, for respondent.

This action is based on the theory that the claim for exemp-

tions rendered the first lien of no avail, and there being no exemptions as against appellant's debt, he acquired a prior lien. If this be true, then the exemption law operates not for the benefit of the debtor, but the dilatory creditor. The exemption right is personal, and appellant could not complain of its subsequent waiver. The statute cannot be made to change priorities among creditors. *Garrett's Appeal*, 32 Pa. St. 160, 72 Am. Dec. 779. The sheriff never released the levy under the first attachment. The lien was not destroyed by the claim merely. *Garrett's Appeal*, *supra*; *Hatch v. Bartle*, 45 Pa. St. 166, 84 Am. Dec. 484.

By the COURT :

The judgment is affirmed, the court being of opinion that the debtor not having elected to claim her exemptions out of the property taken under the first attachment, its lien became superior to that of the second. All concur, except *TEMPLETON, J.*, not sitting.

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DEAN, Respondent, *v.* FIRST NATIONAL BANK, Appellant.

**Evidence — Parol to Vary Written Instrument — Competency.**

In an action of replevin against a mortgagee of an entire stock of goods, the court permitted the plaintiff to show that at the time the mortgage was given it was agreed between the parties that the plaintiff, a creditor of the mortgagors, might take from the stock a sufficient amount to pay his debt, and that it was on this condition the mortgage was given. *Held*, error.

(Argued and determined at the May Term, 1889.)

APPEAL from the district court, Lincoln county; Hon. C. S. PALMER, Judge.

This was an action in claim and delivery by Frank M. Dean, plaintiff, against the First National Bank of Canton, Dakota, defendant, to recover possession of a part of a general stock of merchandise. The only real issue in the case was the right of property. The plaintiff claimed title and the right to possession under a purchase from M. B. Dean & Co. The defendant claimed the right to possession under a chattel mortgage from the same parties. It appeared that M. B. Dean & Co., a firm at Canton,

Dakota, in October, 1885, were owing the bank, and that the bank desired to have the indebtedness secured by a chattel mortgage on the firm's stock of general merchandise. In this matter two bank officers, Gale and Gifford, acted for it, and M. B. Dean and Mrs. E. J. Dean, for the firm. The plaintiff, to prove title, was permitted to show the conditions under which he claimed the mortgage was given. On an inquiry of this character M. B. Dean testified as follows: "I finally consented to give him [Gale] a mortgage and it was agreed between us that the plaintiff, Frank M. Dean, should take goods enough out of the stock to pay his claim. This arrangement to pay plaintiff with goods was suggested by Mr. Gale and Mr. Gifford, and Frank M. Dean was to move sufficient of the goods to pay his claim as soon as possible, and on the goods remaining the bank was to have a mortgage. At the last conversation in the evening, after supper, on October 23, 1885, when Mrs. E. J. Dean was present, Mr. Gale explained the matter as above stated and the arrangement was completed and mortgage given to the bank upon the conditions and agreements above stated. And it was further agreed that the mortgage to the bank was not to be put on record until October 26, 1885, after the exemptions and goods Frank M. Dean was to have were removed. We in conversation arranged on the suggestion of the bank to give a bill of sale to Frank M. Dean for the goods he was to receive; and in the last conversation, Mr. Gale told us to be sure and have Frank's part of the goods separated from the rest, and removed the next morning."

Mrs. E. J. Dean testified as follows: "We were to give a mortgage, leaving out Frank M. Dean's goods and our exemption goods; the mortgage was to cover the rest of the goods after those were taken out; the mortgage was there ready for us to sign. This conversation was just prior to the act of signing."

The defendant objected to all of this testimony on the ground that it tended to qualify and contradict the terms of the mortgage. The objection was overruled and the defendant excepted.

The plaintiff put in evidence a bill of sale from M. B. Dean & Co., for the goods in controversy. It was dated October 24, 1885. The defendant's mortgage was upon the entire stock, and contained no reservations or conditions with reference to goods to pay



the plaintiff's debt. The mortgage was dated the 23d of October, 1885, and was given to secure a note that matured the next day. It was filed for record the morning of the 24th, and the bank took possession of the entire stock of goods that day.

A verdict was rendered in favor of the plaintiff. After the denial of a motion for a new trial and the entry of final judgment, the defendant appealed.

*R. B. Tripp*, for appellant.

The court erred in permitting proof of the alleged parol conditions, reservations and negotiations. *M. B. Dean & Co.* could not, in this way, contradict the terms of this mortgage, neither can the plaintiff, who claims under them. 2 Whart. Ev. (3d ed.), § 1051; *Brenner v. Luth*, 28 Kan. 581; *Thompson v. McKee*, 5 Dak. 172, 37 N. W. Rep. 367; *Bank v. Dunn*, 6 Pet. 51; *Best v. Bank*, 101 U. S. 93; *Beers v. Beers*, 22 Mich. 42; *Spence v. Bowen*, 41 id. 149; *Brewster v. Patruff*, 20 N. W. Rep. 823; *Osborn v. Hendrickson*, 7 Cal. 282; *Feusier v. Sneath*, 3 Nev. 120; *Krewson v. Pardom*, 16 Pac. Rep. 480; *Hindman v. Edgar*, 17 id. 862; *Snyder v. County*, 8 id. 917; *Child v. Wells*, 13 Pick. 121; *Clark v. Houghton*, 12 Gray, 38; *Wright v. Smith*, 16 id. 499; *Lincoln v. Parsons*, 1 Allen, 388; *Dodge v. Nicholl*, 5 id. 548; *Colt v. Cone*, 107 Mass. 285; *Stowell v. Buswell*, 135 id. 340; *Drake v. Starks*, 45 Conn. 96; *Jarvis v. Palmer*, 11 Paige, 650; *Dunn v. Hewitt*, 2 Denio, 637; *Pierpont v. Barnard*, 5 Barb. 364; *Wintermute v. Light*, 46 id. 278; *Howlett v. Howlett*, 56 id. 467; *Baltes v. Ripp*, 3 Keyes, 210; *Mott v. Richtmyer*, 57 N. Y. 49; *Carton v. Vine-land*, 33 N. J. Eq. 466; *Caldwell v. Fulton*, 31 Pa. St. 475; *Miller v. Smith*, 33 id. 386; *Heebner v. Worrall*, 38 id. 376; 44 id. 392; *Lloyd v. Farrell*, 48 id. 73; *Watson town C. M. Co. v. Elensport L. Co.*, 99 id. 605; *Doe v. Swails*, 3 Ind. 329; *Cincinnati, U. & F. W. R. Co. v. Pearce*, 27 id. 502; *Hostetter v. Auman*, 20 N. E. Rep. 506; *Farrar v. Hinch*, 20 Ill. 647; *McCloskey v. McCormick*, 37 id. 66; *Orton v. Harvey*, 23 Wis. 99; *Knox v. Clifford*, 37 id. 651; *Hei v. Heller*, 10 N. W. Rep. 620; *Isett v. Lucas*, 17 Ia. 503; *Van Evera v. Davis*, 51 id. 637; *Taylor v. Trulock*, 8 N. W. Rep. 306; *Van Vechten v. Smith*, 13 id. 94; *Hutton v. Maines*, 28 id. 9; *Tatman v. Barrett*, 3 Houst.

(Del.) 226; Broughton v. Caffer, 18 Gratt. 184; Moody v. McCown, 39 Ala. 386; Mayoe v. Briggs, 3 Head (Tenn.), 36; Aldrich v. Hapgood, 39 Vt. 617; Harrell v. Durrance, 9 Fla. 490; Meekins v. Newberry, 7 S. E. Rep. 655; Barnett v. Barnett, 2 id. 733; Dyar v. Walton, 7 id. 220; Madison & I. P. R. Co. v. Stevens, 6 Ind. 379; Warren v. Crew, 22 Ia. 315; Wemple v. Knopf, 15 Minn. 355; Harrison v. Morrison, 40 N. W. Rep. 66; Cocks v. Barker, 49 N. Y. 107; Holzworth v. Koch, 26 Ohio St. 33.

*Coughran & McMartin*, for respondent.

The testimony objected to shows the sale to have been made before the mortgage; its lien, therefore, never attached to the plaintiff's goods, as the mortgagors at the time of executing the mortgage had no title. It was under these conditions the mortgage was obtained. In view of this, and the circumstances showing a fraud on the part of the bank, the whole transaction was open for parol proof, notwithstanding the terms of the mortgage. The first inquiry is, is there a document to construe? It is always permissible to show that it was conditional. Whart. Ev., § 927. Appellant's citations are cases between the parties, or those claiming under the same instrument. Here the claim is in hostility to the instrument. Plaintiff is a stranger thereto; in such case the rule contended for has no application. Whart. Ev., §§ 920, 923, 1041, 1065, 1078, 1088; Stephen, Art. 90; 1 Gr., §§ 189, 279; Abb. T. Ev., pp. 7, 294; Woodman v. Eastman, 10 N. H. 359; Edgerly v. Emerson, 23 id. 555; Furbush v. Goodwin, 25 id. 425; Thomas v. Truscott, 53 Barb. 200; Barreda v. Silsbee, 21 How. 169; Washburn & M. Co. v. Chicago, etc., Co., 109 Ill. 71; Smith v. Moynihan, 44 Cal. 64; Hassman v. Wilke, 50 id. 250; McMartin v. Ins. Co., 55 N. Y. 234; Carver v. Jackson, 4 Pet. 1; Bigelow, Est. (4th ed.) 333.

By the COURT:

This case is reversed for the reason that the court allowed evidence to be given as to what the statements and negotiations of the parties to the chattel mortgage were at the time of its execution and which materially altered and varied the terms of the instrument. All concur except AIKENS, J., not sitting.

TERRITORY OF DAKOTA, EX REL., Respondent, v. ARMSTRONG ET AL., Appellants.

**Pleading — Sufficiency — Quo Warranto — Remedy — Parties.**

Under § 2, chap. 112, L. 1883, Comp. L., § 705, providing that "townships having two or more villages \* \* \* may petition the county commissioners for a division, and whenever \* \* \* so petitioned they may \* \* \* divide such townships," an information in the nature of *quo warranto* by the district attorney against the supervisors of a township claiming to have been created by the division of H. township, alleged that on the 6th day of April, 1888, the township of H. was a duly organized township of P. county; that on said date the county commissioners of said county divided said township and out of a part thereof organized the township of B.; that the township of H. never had two or more incorporated villages; that the said commissioners were never petitioned by said township of H. for a division; that the petition upon which the said commissioners acted was signed by less than one-half of the legal voters of said township; that said petition was not signed by the supervisors of said township, or any of them; that the defendants were elected to the pretended offices of supervisors of said new township of B. and assume to hold, exercise, and are actually holding and exercising the functions of said offices; that after the said pretended organization the residents of the said B. township proceeded to act in all respects as if the said township had been legally organized; that the reason that all the residents of said township are not made parties to the action is, that there are over five hundred of them and it would be impracticable to bring them before the court, and their interests will be faithfully represented by the defendant supervisors. *Held*, 1. That *quo warranto* was the proper remedy. 2. That the district attorney was the proper party to bring the action, section 534, C. C. Pro., providing the "district attorney in the name of the territory, upon his own information," may bring an action against any person who shall "unlawfully hold or exercise any public office," or any number of persons who "shall act \* \* \* as a corporation without being duly incorporated." 3. That it was not necessary to join the alleged B. township. 4. That the information stated facts sufficient to constitute a cause of action.

(Argued and determined at the May Term, 1889.)

**A** PPEAL from the district court, Pembina county; Hon. CHAS. F. TEMPLETON, Judge.

This was a proceeding in the nature of *quo warranto* in the name of the territory upon the relation of the district attorney of Pembina county, against J. A. Armstrong, James Weeks and Thomas Hodgson, to inquire by what authority they were exercising the offices of supervisors of the township of Bathgate, Pembina county, Dakota.

The information, or complaint to which a demurrer was over-

ruled, alleged: That the township of Hamilton is situated in the county of Pembina, Dakota Territory, and was at the time hereinafter mentioned and ever since has been and still is legally laid out and organized as a civil township under the laws of said territory, and includes and is wholly made up of congressional townships 161 and 162, north of range 53 west; that on or about the 6th day of April, 1888, the county commissioners of said county attempted to lay out and organize a new civil township called Bathgate, and did lay out and organize said township; that in laying out and organizing the said township said board took from said township of Hamilton, the following portion thereof, to-wit: Sections 1 to 30 inclusive in township 162, and the said new town was organized as aforesaid, wholly out of said portion so taken from the town of Hamilton; that the said township of Hamilton was not divided by any river, lake, or creek, in the manner the said board attempted to divide said township in organizing said pretended township of Bathgate; that said township of Hamilton has never had two or more incorporated villages or cities, each containing two hundred or more inhabitants; that the said board never have been petitioned by said township of Hamilton for a division, and the petition upon which the said board based its action in laying out and organizing the pretended township was signed by less than half the legal voters residing in the township of Hamilton; that said petition was not signed by the supervisors of the township of Hamilton, or any of them, and the petition so signed as aforesaid, was the only petition presented to said board, and the only petition upon which said board acted; that on or about the 6th day of April, 1888, the defendants, J. A. Armstrong, James Weeks and Thomas Hodgson, were elected to the pretended offices of supervisors of said township at Bathgate, and ever since have been and still are officers of said pretended township and assume to hold and exercise, and are actually holding and exercising the functions of said pretended offices of supervisors of said pretended township; that after the pretended organization of said township the residents thereof proceeded to act in all respects as a municipal or township organization, duly and lawfully organized and elected an assessor, town clerk, treasurer, said three supervisors, two justices of the peace, two constables, three road

overseers and the other officers of a lawful township; that the said officers so elected and all the residents of the said pretended township are exercising without authority of law the functions, rights, franchises and privileges of a township corporation under the name of Bathgate; that the said residents of the said pretended township have no authority to exercise the franchises, powers and functions of a township for the reason that the said township was never lawfully laid out and organized, and that the said commissioners acted without authority of law and without jurisdiction in laying out the same, and that their acts are null and void; that the said officers so elected as aforesaid are all assuming and exercising the functions of the several offices of the said pretended township; that the reason all the residents of the said pretended township are not made parties to this action is because there are over five hundred of them, and it would be impracticable to bring them all before the court, and that it would involve great labor and expense, and cause great delay in the prosecution of this action and thereby prejudice the interests of all parties interested; that the residents of the said pretended township and the officers thereof, are in harmony in their efforts to sustain the said unlawful organization, and the residents will be well and faithfully represented by the said supervisors, who are defendants of record in this action; that the question to be determined in this action, to-wit: The legality of the organization of the said pretended township of Bathgate, and the legal existence of said township, is one of common interest to all the said residents of said pretended township, and the defendants in this action are the supervisors thereof, and that it would be impossible to make all of said residents parties for the reason that said residents will change constantly by new residents coming in, old residents going out, and by death and birth.

There was a prayer that the defendants be restrained from exercising the functions of the offices of supervisors, and that the action of the commissioners in organizing the township be declared null and void. The defendants demurred to the complaint on the grounds: 1. That the court had no jurisdiction of their persons, or the subject of the action. 2. That the plaintiff has no legal capacity to sue. 3. That there is a defect of parties

defendant, in that the township of Hamilton and the inhabitants of the township of Bathgate should have been made parties. 4. That several causes of action have been improperly united. 5. That the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled and the defendants electing to stand upon it, final judgment was entered against them, and they appealed to this court.

*Stack & Hoskins*, for appellants.

The acts of the commissioners in such matters will be presumed valid. *State v. Supervisors*, 39 Wis. 595; 1 Gr., § 51. The statute does not require that there shall be two *incorporated* villages. That the commissioners were not petitioned was the allegation a legal conclusion. *State v. Anderson*, 69 Wis. 471; Bliss Pl., § 206. The statute (§ 705, Comp. L.) does not require the petition to be signed by any special number of voters or residents. The new township should have been made a party. §§ 705, 4879, 7114; *State v. Messmore*, 14 Wis. 115; *Scrafford v. Gladwin*, 41 Mich. 653; *State v. Board*, 14 Atl. Rep. 560; *State v. Village*, 32 Vt. 50; *People v. Stafford*, 19 Pac. Rep. 693; 29 Ia. 246; High, Ex. Rem., § 684; *Gillett v. Traganza*, 13 Wis. 472. *Quo warranto* was not the proper remedy. §§ 5348, 5356, C. L.; *Nelson v. McArthur*, 38 Mich. 204; *Attorney-General v. Hanchett*, 42 id. 436. It should have been *certiorari*. This would have ended the controversy. §§ 5507, 5509, C. L.; *Milwaukee Iron Co. v. Schubel*, 29 Wis. 444; *State v. Whitford*, 54 id. 150, 11 N. W. Rep. 424; *State v. Dodge*, 32 Wis. 79; *State v. Kennen*, 61 id. 494, 21 N. W. Rep. 530; *Merrick v. Township*, 41 Mich. 630, 2 N. W. Rep. 922; *Agnew v. Mayor*, 2 Hill, 1; §§ 592, 705, C. L.; *Pulling v. Supervisors*, 3 Wis. 304; *Waugh v. Chauncey*, 13 Cal. 11; *Fall v. Paine*, 23 id. 302; *Thomas v. Armstrong*, 7 id. 287; *People v. El Dorado Co.*, 8 id. 58; *People v. Marin*, 10 id. 344; *People v. Mayor*, 5 Barb. 44; *Conover v. Devlin*, 24 id. 641; *People v. Supervisors*, 15 Wend. 198; *Geger v. Chippewa*, 47 Mich. 167, 10 N. W. Rep. 168; *Woodworth v. Gibbs*, 61 Ia. 398, 16 N. W. Rep. 287; *Stultus v. State*, 65 Ind. 492; High, §§ 618, 689; *State v. City*, 31 Ia. 432; *People v. Whitcomb*, 55 Ill. 172; *State v. Marlow*, 15 Ohio St. 114; *People v.*

Ridgeley, 21 Ill. 64 ; *State v. Shields*, 56 Ind. 521 ; *Dart v. Houston*, 56 Ga. 106.

*George H. Megquier and Bosard & Corliss*, for respondent.

Although *certiorari* would lie, still this case falls within section 534, subdivision 3, and *quo warranto* is the proper remedy. *State v. Bradford*, 32 Vt. 50 ; *People v. Clark*, 70 N. Y. 517 ; *Cheshire v. Kelly*, 6 N. E. Rep. 486 ; *State v. Borough*, 10 Atl. Rep. 377 ; *High, Ex. Rem.*, § 684 ; *People v. La Rue*, 8 Pac. Rep. 84 ; *State v. Board*, 14 Atl. Rep. 560 ; *People v. Riordan*, 41 N. W. Rep. 482 ; *State v. Parker*, 25 Minn. 215 ; *Renwick v. Hall*, 84 Ill. 162 ; *People v. Carpenter*, 24 N. Y. 86.

It would have been improper to have made the alleged township a party, as that would have recognized its organization. *Cheshire v. Kelly*, 6 N. E. Rep. 486 ; *People v. R. R. Co.*, 15 Wend. 114 ; *People v. Richardson*, 4 Cow. 97 ; *Commonwealth v. Central P. R. R. Co.*, 52 Pa. St. 506 ; *Angell & A. Corp.*, § 756 ; *People v. Supervisors*, 41 Mich. 647, 2 N. W. Rep. 904 ; *Dillon, Mun. Corp.*, § 895 ; *People v. Cincinnati Gas Co.*, 18 Ohio St. 262 ; *State v. Com. Bank*, 33 Miss. 474 ; *Draining Co. v. State*, 43 Ind. 236 ; *People v. Sowden*, 8 Pac. Rep. 66 ; *Attorney-General v. Perkins*, 41 N. W. Rep. 426 ; *State v. Jenkins*, 25 Mo. App. 484 ; *C. C. Pro.*, § 534. It was only necessary to proceed against the alleged officers. See above cases ; also *Supervisors v. Mineral P. R. R. Co.*, 24 Wis. 93 ; *Smith v. Swarmstedt*, 16 How. 288 ; *Nilson v. Costo*, 31 Cal. 427 ; *C. C. Pro.*, §§ 83, 113, 531.

We claim the board has no power to act unless the township contains two or more *incorporated* villages. But in this case there was no petition. It cannot be said a township petitions when the petition is not signed by the supervisors, or any of them, or by one-half of the voters residing in the town. It is admitted that the board was not petitioned at all by the township of Hamilton. The board, therefore, had no power to act. § 705, Comp. L.

By the COURT :

The judgment in this case is affirmed, the court being of opinion, 1. That *quo warranto* is a proper remedy.

2. That the action is properly brought under our statute in the name of the district attorney.



3. That the action is properly brought against the defendants without joinder of the alleged corporation.

4. That the complaint sufficiently states a cause of action. All concur except TEMPLETON, J., not sitting.

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EDMISON, Appellant, v. HANCOCK, Respondent.

**Specific Performance—The Contract, Sufficiency of the Evidence to Establish.**

E., a real estate agent, wrote to H., the owner of certain lots, for the agency to sell them and for the price at which they might be sold. Upon receipt of the answer giving the price, E. telegraphed H. that he accepted his offer. H. afterward refused to execute a deed. *Held*, there was no sufficient evidence of a contract between the parties to authorize a judgment of specific performance.

(Argued and determined at the May Term, 1889.)

**A** PPEAL from district court, Minnehaha county; Hon. J. E. CARLAND, Judge.

This was an action by P. H. Edmison, plaintiff, against W. J. Hancock, defendant, to compel the conveyance of lot 4 and the north twenty-two feet of lot 5 in block 19, J. L. Phillips' Addition to Sioux Falls. The only issue in the case was the sufficiency of the evidence to constitute a contract that would authorize specific performance. All of the evidence on this subject consisted of certain letters and telegrams, which were as follows:

"COUNCIL BLUFFS, Iowa, *Aug. 25th*, 1887.

Mr. P. H. EDMISON, Sioux Falls, Dak. :

DEAR SIR:— Your letter of the 18th instant arrived during my absence in New York, which will account for the delay in answering it. You can have the lot my mother leased to you for \$5,500 as I told you when I last saw you and no less paying \$1,000 down and the balance in three or five years, as you prefer, at 8 per cent interest payable semi-annually. The three lots, 22 feet each, the little houses are on, are for sale for \$1,500 each, net, one-third down, balance in three or five years at 8 per cent. This offer will hold good for thirty days unless otherwise advised. Yours truly, W. J. HANCOCK."

In answer to this plaintiff sent the following dispatches :

“ SIOUX FALLS, D. T., *Aug. 28th.*

W. J. HANCOCK — I accept both your offers to sell property in your letter of the 25th inst., at price and terms stated. P. H. EDMISON.”

“ SIOUX FALLS, *Dak.*, 8-29, 1887.

W. J. HANCOCK — I accept your offers to sell of 25th instant, forward deeds. P. H. EDMISON.”

It appeared Mr. Hancock did not forward the deeds and complete the sale.

Plaintiff also put the following letters in evidence :

“ COUNCIL BLUFFS, Iowa, *September 7th*, 1887.

Mr. P. H. EDMISON, Sioux Falls, Dakota :

DEAR SIR:— By your telegram and letter you seem to be under the impression that in my letter of the 25th I offered you all of my lots. This is an error, and as you seem to understand it differently I will, to save further trouble and misunderstanding, decline to sell at your figures and withdraw the offer I made on the 25th. Yours truly, W. J. HANCOCK.”

“ SIOUX FALLS, *August 29th*, 1887.

W. J. HANCOCK, Esq., Council Bluffs, Iowa :

Yours of the 25th instant received stating price and terms of sale of your lots and your mother's which I accepted by telegraph. Send along the deeds and will pay the amount cash required and execute mortgages for balance as per terms of your letter of the 25th instant. Describe your lots as lot four and all of five except twenty-two feet on south side which you sold to Jordan Bros. Would like deed to yours as soon as possible as I may trade them. Send the other at your convenience at any time before the 23d of next month. Yours truly, P. H. EDMISON.”

“ SIOUX FALLS, D. T., *Sept. 9*, 1887.

W. J. HANCOCK, Esq., Council Bluffs, Iowa :

“ DEAR SIR:— Your letter received declining to fulfil your contract with me as per your offer to sell lots in your letter of 25th inst. There can be no misunderstanding and is none. I accepted price and terms as stated in your letter of August 25th, 1887, three lots 22 feet each, your own and the lot I have leased from your mother. I am and have been ready to fulfill my part of the contract, your money is ready and ask of you and your mother to per-

form your part, as you refused in your letter (which was rather a surprise to me) to protect myself, commenced suits and put *Lis Pendens* on the property. I have sold part of this property and insist on you and your mother fulfilling your part of the contract. Costs at present not much and will put no more on than necessary till I see whether you intend to do as you agreed, or not. Best to send on your deeds. Yours truly, P. H. EDMISON."

On plaintiff's cross-examination over objection the defendant put the following letter in evidence :

" SIOUX FALLS, Aug. 18th, 1887.

W. J. HANCOCK, Esq., Council Bluffs :

" DEAR SIR :—Mr. Greely is here and will remain a few days. If I trade at all I will have to do it now. Send me definitely the lowest price you will take for the lot, \$1,000 cash, with mortgage on lot for balance, on or before three or five years, with interest at 7 per cent. Make the offer definite and good for twenty or thirty days so if I can make any trade satisfactory on terms your offer will be in shape to know what I can rely on. Also give me your lowest price on the lots between Eleventh and Twelfth streets, on Phillips avenue, and allow me five per cent commission for making sale, if I make it. Write your letter so I can show if necessary what your price is. Make your price five per cent. higher than you will take for them. Lots often sell higher before a railroad gets there than it does after, and it might be a good time to sell them. I am opening up an office and would like to have them to sell and might catch a customer for them. Make first payment as small as you can as it might help to sell them. Please answer as soon as ever you can. Yours truly, P. H. EDMISON."

The evidence showed that lot 4 was forty-four feet wide, that the south twenty-two feet of lot 5 had been sold and there remained twenty-eight feet of the lot. It was found by the court that a business lot there had a frontage of twenty-two feet.

There were findings and a decree in favor of the defendant, and the plaintiff appealed.

*Wilkes & Wells*, for appellant.

The inquiry is, did the minds of the parties assent to the same

thing? Was there a contract? From the respondent's letter of the 15th, and appellant's dispatches of acceptance, we contend there was. The proposal was to sell sixty-six feet of ground, and this was accepted. It is true that in the letter of the following day there is a suggestion as to the description, but it in no way qualified the acceptance. Suppose the position reversed, and respondent insisting on the contract, could appellant be heard to say his telegrams were a conditional offer to buy?

*Winsor & Kittredge*, for respondent.

Specific performance for three lots of twenty-two feet each is demanded. This cannot prevail in view of appellant's letter of acceptance and our statute. § 896, C. C.

In any event, there was no offer to sell the property to this appellant, there was no contract between *them*. The statement of a price is not an offer to sell. *Knight v. Cooley*, 34 Ia. 218; *Talbot v. Pettigrew* (Dak.), 13 N. W. Rep. 576; *Smith v. Gowdy*, 8 Allen, 566.

By the COURT:

This case is affirmed — there being no sufficient evidence of a contract between the parties to authorize a judgment of specific performance. All concur.

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TERRITORY OF DAKOTA, Defendant in Error, *v.* COLLINS, Plaintiff  
in Error.

**1. Appeal — Review — Harmless Error.**

Where a witness is not permitted to answer a proper question, but at another time is allowed to answer it in effect, there is no reversible error.

**2. Same — Objection Waived — Misconduct of Attorney.**

Where the prosecuting attorney in his closing address to the jury, stated a fact not in evidence, prejudicial to the defendant, but the record only showed an objection and exception to it; *held*, it was not saved so as to be reviewed by the appellate court.

(Argued and determined at the May Term, 1889.)

**E**RROR to the district court, Walsh county; Hon. CHAS. F.  
TEMPLETON, Judge.

The defendant was indicted and convicted of the crime of murder.

At the trial one Andrew Anderson was one of the principal witnesses of the homicide, and testified for the territory very fully as to it. On his cross-examination he was asked if he was not "drunk" at the time. The prosecution objected to the inquiry on the ground that it was not proper cross-examination. The court sustained the objection and the defendant excepted. The record, however, showed that during his examination he answered a question that this court deemed was the same in effect.

One of the attorneys for the prosecution in his closing remarks to the jury, referring to the mother of the deceased, Moore, respecting whom no evidence had been introduced, used this language: "If we were to travel outside of this case, and travel for sympathy, we could show that the mother of this Moore boy was made insane by this act, hopelessly insane, that she was made mad."

The defendant objected to these remarks at the time they were made and asked an exception, which was granted. The court in its charge to the jury instructed them in effect that they had no right to consider any thing but the evidence that had been given in open court. The record did not show any further action of the trial court, or a request for any, with reference to the remarks to which objection was made.

*W. J. Hughes, J. H. Hill and T. D. O'Brien*, for plaintiff in error.

*Johnson Nickens, Attorney-General*, for defendant in error.

By the COURT:

The judgment in this case is affirmed — the court holding that while the question asked the witness Anderson as to whether or not he was drunk, was proper cross-examination; yet, there was no reversible error, as he was permitted to answer the question in effect at another time.

The objectionable remarks of the attorney for the prosecution to the jury are not saved by the record so as to be reviewed by this court. All concur, except TEMPLETON, J., not sitting, and CROFOOT, J., not voting.

NORTHERN PACIFIC RAILROAD COMPANY, Appellant, v. JACKMAN,  
Respondent.

**Estoppel — Use of Alternative Right — Parties.**

Where a railroad company had been granted a right of way over the public lands of the United States, and, also, power to condemn such right over the lands of private parties, *held*, that where it had condemned a right of way over public land of which one was in possession under the pre-emption laws of the United States and had paid the money into court, for the owner, it could not, after the occupant had received his patent, contest his right to the money. *Held, also*, that the company was an improper party to a proceeding to get the money out of court.

(Argued and determined at the May Term, 1889.)

**A** PPEAL from the district court, Burleigh county ; Hon. ROD-  
ERICK ROSE, Judge.

This was a proceeding to obtain certain money that had been paid into court in certain condemnation proceedings.

It appeared that in January, 1881, the appellant, the Northern Pacific Railroad Company, had condemned a right of way across certain land of which the respondent, John J. Jackman, was in possession ; his right to the land, however, being contested at the time by other parties, the court ordered the amount of the award of the commissioners to be deposited in court to abide an order of payment. The money was deposited as directed and the matter so remained until the 13th of March, 1889, when, upon an affidavit of the respondent, filed in the condemnation proceeding, the court ordered the appellant among others to show cause why the money should not be paid to the respondent. Upon the hearing the court found the respondent was a person qualified to pre-empt land under the laws of the United States ; that prior to the commencement of the condemnation proceedings he had entered upon the land and had paid the government price therefor ; that on the 11th day of May, 1883, a patent was duly issued to him for the land ; “that prior to the said [condemnation] proceedings the said railroad company had established the line of definite location of its said road past said land, and at a point southerly and at a point considerably distant therefrom.” Upon these findings it ordered the money to be paid to the respondent, and the company appealed.

The act incorporating appellant and conferring the rights and powers referred to will be found in 13 U. S. Stat. 365.

*Hollembaek & Long*, for appellant.

By section 2, act of congress, July 2, 1864, appellant was given a right of way over this land that was superior to rights, respondent acquired under his subsequent settlement. *St. Joseph & D. C. R. R. Co. v. Baldwin*, 103 U. S. 426; 10 Copp's L. Laws, 74. This right could not be lost except by some clear and unequivocal act of the company showing its purpose to waive it. There was no definite location prior to the condemnation, as no map or plat had been filed with the commissioner of the general land office. *Van Wyck v. Knevals*, 106 U. S. 360; *Waldron v. Knevals*, 114 id. 373; Report, Commissioner General Land Office for the year 1888, p. 239; *City v. Hackett*, 2 Copp's L. Laws, 1296.

Appellant is not estopped to claim the money paid into court. *Bigelow*, *Estop.* (4th ed.) 48; *Estate of Holbert*, 57 Cal. 257; *Hawkes v. Truesdell*, 99 Mass. 557; *Burlen v. Shannon*, id. 200; *Webb v. Buckalew*, 82 N. Y. 555; *Leonard v. Barker*, 5 Den. 220; *McLaughlin v. McGee*, 79 Pa. St. 217; *Hooker v. Hubbard*, 102 Mass. 245; *Brant v. Virginia C. & I. Co.*, 93 U. S. 326; 1 Story, Eq. 391.

*George W. Newton*, for respondent.

The grant referred to was of one right of way only and it became exhausted on the location of the line which took place prior to the condemnation. *A. F. & P. C. R. R. Co. v. City*, 66 Mo. 228; *Attorney-General v. W. W. R. R. Co.*, 36 Wis. 466; *Brigham v. A. B. R. R. Co.*, 1 Allen, 316; *Pierce*, 254.

Appellant acquired its right in this case under section 7 of the act, and having two ways of acquiring the property, it is bound by the one it selected. *Sedg. St. & C. L.* 86; *Morrison v. Underwood*, 5 Cush. 52; *City v. Fregschlag*, 56 Cal. 8; *City v. Reed*, 65 id. 241; *Burman v. Van Buren*, 44 Mich. 496; *Thompson v. Howard*, 31 id. 309; *Smith v. Hudson*, 4 T. R. 211; *Birch v. Wright*, 1 id. 378; *Nield v. Burton*, 49 Mich. 53; *Carnihan v. Thompson*, 111 Mass. 270; *Andrews v. Ætna Ins. Co.*, 92 N. Y.



596; Noe v. Splinola, 54 Cal. 207; Smith v. Cramer, 39 Ia. 413; Haswell v. Vt. C. R. R. Co., 23 Vt. 228; 27 id. 100; id. 500.

By the COURT:

The judgment is affirmed, the court being of opinion that the railroad company having proceeded to condemn the premises under the statute, and having paid into court for the owner the amount of the award of the commissioners, it cannot in this manner be heard to contest the validity of such award, and is not a proper party to this proceeding. All concur excepting Rose, J., not sitting.

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RODGERS ET AL., Petitioners, v. McCoy, Respondent.

**Constitutional Law — Legislative Power — Licensing Peddlers.**

Section 80, chap. 28, Pol. C., § 2433, Comp. L., requiring peddlers of "merchandise not manufactured within the limits of this territory," to pay a license, is unconstitutional as a discrimination against goods manufactured in other states and territories.

(Submitted and determined at the May Term, 1889.)

**T**HIS was an original proceeding in *habeas corpus*.

The petitioners for the writ were Charles D. C. Rodgers and George A. Shipton. It was alleged in the petition that they were illegally imprisoned in the town of Lokota, Nelson county, Dakota, by Frank K. McCoy, sheriff, under a joint final sentence and commitment by a justice of the peace of that county, for "having peddled and sold from house to house, jewelry, contrary to the provisions of section 2433," Comp. L. of Dakota. There was a stipulation that the sole ground of the detention was under and by virtue of this commitment.

Section 2433 is as follows: "A tax of \$30.00 for territorial purposes shall be levied upon each peddler of watches, clocks, jewelry or patent medicine, and all other wares and merchandise not manufactured within the limits of this territory, for a license to peddle throughout the territory for one year." The next section provided for obtaining the license, and the one following, the penalty for omitting to obtain it.

*W. H. Standish*, for petitioners.

The question involved is, does section 80, chap. 28, Pol. C., § 2433, Comp. L., discriminate against wares and merchandise not manufactured in this territory. There can be no doubt but that it does. See *Robbins v. Taxing District*, 120 U. S. 489, 7 Sup. Ct. Rep. 592; *Corson v. Maryland*, 120 U. S. 502, 7 Sup. Ct. Rep. 655; *Ward v. Maryland*, 12 Wall. 418; *Stockton Laundry Case*, 26 Fed. Rep. 611; *City v. Pelton*, 18 Pac. Rep. 954; *Fecheimer v. City*, 2 S. W. Rep. 65; *City v. Blum*, 12 N. W. Rep. 266; *O'Brien v. Krentz*, 30 id. 485; *State v. Harris*, 8 Pac. Rep. 462.

*M. N. Johnson*, for respondent.

By the COURT:

The judgment and sentence of the court below is declared to be null and void, and the petitioners are ordered to be discharged from custody on the ground that the statute under which they were tried and sentenced is unconstitutional and void, as it attempts to discriminate in the sale of goods, wares and merchandise manufactured in other states and territories. All concur.

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REICHERT, Respondent, v. SIMONS ET AL., Appellants.

**1. Chattel Mortgages — Filing, Effect.**

In this jurisdiction the filing of a chattel mortgage is equivalent to an actual delivery and continued change of possession of the property mortgaged, as such act saves it from the operation of section 2024, C. C., declaring fraudulent and void all transfers not accompanied by an actual and continued change of possession of the things transferred.

**2. Same — Possession — Fraud — Burden of Proof.**

Where a chattel mortgage has been duly filed, the fact that the mortgagor remains in possession of the property, furnishes, of itself, no evidence of fraud. In such case, where a creditor attacked the mortgage for fraud, it was held proper to instruct the jury that the burden of proof was upon him to establish that it was fraudulent.

(Argued February 11, 1889; affirmed February 19; opinion filed May 31, 1889.)

APPEAL from the district court, Barnes county; Hon. W. H. FRANCIS, Judge.

*John S. Watson and Dillon & Preston*, for appellants.

The court erred in its instruction as to the burden of proof.

At the time of the levy the goods were in the possession of the mortgagor; this alone cast upon the plaintiff, the burden of showing consideration sufficient to support the instrument. Bump, Fraud. Con. 44, 115, 118, 119; Wait, Fraud. Con., § 271; Jones, Chat. Mortg., §§ 325, 326; Jones v. Franks, 6 Pac. Rep. 789.

*Herman Winterer and F. H. Remington*, for respondent.

The only exception saved was to the instruction upon the burden of proof. It correctly stated the law. Bump, Fraud Con. (3d ed.) 600, 603, and authorities cited. See, also, Nugent v. Jacobs, 103 N. Y. 125-9; Wait, Fraud. Conv., § 271.

The cases cited by appellant relate to the sale of property. Where the property is left in the possession of a vendor, the rule is different from where it is left in the possession of a mortgagor. In the former case, the presumption is that the transfer is fraudulent; in the latter, there is no such presumption if the mortgage has been filed for record. Section 2024, C. C., excepts mortgages from the presumption of fraud, when there is not a change of possession. Under the registry laws, the filing or recording of a mortgage has the same effect as a delivery of the property. Jones, Chat. Mortg., §§ 236, 329; Cotton v. Marsh, 3 Wis. 221; Bond v. Seymour, 1 Chand. (Wis.) 40; Frankhouser v. Elliott, 22 Kan. 127.

TEMPLETON, J. On the 6th day of January, A. D. 1887, Leopold Bros. & Co., of Chicago, Ill., commenced an action in the district court of Barnes county, in this territory, against one Rebecca Less, a resident of Valley City, in said county. A writ of attachment was immediately issued in said action, and was levied upon the stock of goods in question by John Simons, one of the defendants, in his official capacity as sheriff of said county.

It is not disputed that Rebecca Less was the general owner of said stock of goods.

On the 10th day of February, A. D. 1887, Leopold Bros. & Co. recovered judgment against Rebecca Less for the sum of \$1,086.63; execution issued, and the goods previously attached were sold to satisfy the same.

On the 30th day of December, A. D. 1886, seven days prior to the commencement of the action by Leopold Bros. & Co. against

her, Rebecca Less executed a chattel mortgage upon the stock of goods in question in favor of Robert Reichert, the plaintiff in this action, to secure the sum of \$3,250. The mortgage was properly executed, delivered and duly filed.

The plaintiff, Reichert, resided at Philadelphia, Pa. His daughter, Mrs. Less, had been engaged for several years at Valley City in the business of retailing clothing and gents' furnishing goods; her husband assisting her.

The plaintiff, claiming a special property in said stock of goods by virtue of his chattel mortgage, brought this action against the sheriff and the sureties upon his official bond, alleging failure of the sheriff to perform his duty, in that he did not pay, tender, or deposit the amount of the mortgage debt, as required by statute, before taking the property under the writ of attachment, and selling it under the execution.

The defense relied upon in this action was that the mortgage was made without consideration, and was fraudulent and void as to creditors.

All the issues of fact raised by the evidence were found by the jury in favor of the plaintiff, and judgment was accordingly given by the court.

Several questions were discussed by appellants' counsel upon the argument, but an examination of the record discloses that only one material point was saved by proper exception in the court below.

The point saved, and the only one which we have considered, relates to the charge of the court to the jury upon the burden of proof. The court, among other things, instructed the jury as follows: "The law never presumes fraud, and the burden of proof rests upon the defendants in this action to prove that the mortgage set forth in the complaint is fraudulent."

The possession of the mortgaged goods was not delivered to the mortgagee, but remained in the mortgagor; and defendants' counsel insist that, although the mortgage was properly executed and duly filed, it was at least *prima facie* void as to creditors of the mortgagor, and that the burden was upon the plaintiff to establish by affirmative evidence the good faith and validity of the transaction.

The point is not well taken. In this territory the filing of a chattel mortgage, properly executed, and fair and regular upon its face, is equivalent to actual delivery and continual change of possession of the property mortgaged, although the mortgage, in terms, provides for retention of the property by the mortgagor, and possession is retained by him. Such a transaction is not fraudulent *per se*, nor *prima facie* evidence of fraud. In New York and Minnesota, where it is held that the filing of a chattel mortgage is not equivalent to actual delivery and continued change of possession, but that a failure to file is "merely another ground on which a mortgage of personal chattels shall be void," the statutes regarding fraudulent conveyances do not except from their operation a chattel mortgage when allowed by law; but in those states mortgages and absolute sales of chattels are governed by the same rules of law. In this territory, on the other hand, the statute regarding fraudulent conveyances (Civil Code, § 2024) excepts from its operation mortgages of chattels when allowed by law, hence that section in no way conflicts with the rule above laid down regarding the effect of filing a chattel mortgage.

This rule, when established, does not repeal the statute regarding fraudulent conveyances, as would be the case in New York and Minnesota if the filing of the mortgage were held, in those states, equivalent to actual and continued change of possession. Our statute clearly contemplates that the mortgagor may retain possession of the mortgaged property until a breach in the conditions of the mortgage, and it is difficult to see how such an act of itself can be held fraudulent, or even evidence of fraud. When the law authorizes an act, to say such an act is fraudulent seems to me is to state an absurdity.

This view of the case appears to be in harmony with the spirit of our statutes, and is supported by high authority. *Robinson v. Elliott*, 22 Wall. 513; *Frankhouser v. Ellett*, 22 Kan. 127; *Cotton v. Marsh*, 3 Wis. 199; *Jones, Chat. Mortg.*, § 329.

The judgment of the lower court is affirmed.

KRONEBUSCH ET AL., Respondents, v. RAUMIN, Appellant.

**Pleading — Complaint — Sufficiency — Penalty — Liability for.**

By § 1735, sub. 6, C. C., a mortgagee, when his mortgage "has been satisfied," is required to execute and acknowledge a certificate of discharge. In case of refusal he is made liable to the mortgagor in a penalty of \$100. A complaint for this penalty alleged a tender after maturity of the amount due on the mortgage to the mortgagee, the owner and holder; its immediate deposit in his name with notice in a bank of deposit within the territory of good repute, its still remaining there, and his refusal to discharge the mortgage. On demurrer to this complaint it was held the tender and deposit operated as a satisfaction of the mortgage under § 849, C. C., which provides that "an obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor with some bank of deposit within this territory, of good repute, and notice thereof given to the creditor."

(Argued February 16, 1889; affirmed February 19; opinion filed June 3, 1889.)

**A** PPEAL from the district court, Walsh county; Hon. W. B. McCONNELL, Judge.

*Bosard & Corliss*, for appellant.

The only question is whether a tender of the amount of the mortgage debt made and kept good under sections 848, 849, C. C., constitutes such a satisfaction of the mortgage as will render the mortgagee liable for the penalty prescribed by section 1735, in case he refuses to satisfy the mortgage. The statute is penal and must be strictly construed. *Stone v. Lamon*, 6 Wis. 497; *Crumbley v. Barden* (Wis.), 36 N. W. Rep. 19; *Page v. Johnson*, 23 Wis. 295.

There is no statute changing this common-law rule in civil cases. Its existence is recognized by section 10, Pen. C., which declares it has no application to that code. This is true of section 602, C. Cr. Pro. These sections relate solely to the particular codes in which they are found. Under this rule it cannot be said a tender kept good is such a satisfaction as section 1735 contemplates. Such a tender extinguishes the obligation, but the penalty is imposed for refusing to satisfy of record, not an extinguished obligation, but a satisfied mortgage. The two words are not synonymous. The word "satisfied" can have a rational interpretation without its being construed to include a constructive satisfaction. The purpose of the section is to punish a person

who having accepted the money refuses to satisfy the mortgage, for that conclusively shows a willful refusal. To extend the statute to a case of tender would give it a harsh construction; there might be punishment where there was no willful conduct. If such a case falls within it the mortgagee, who honestly believes the amount tendered is insufficient, is compelled to decide at the risk of losing a portion of his debt, incurring this penalty in addition to all the damages the mortgagor may sustain. There is no distinction as to whether the refusal proceeds from willfulness, or an honest mistake.

The tender kept good destroys the lien, and the mortgagor may compel satisfaction, and where there is a willful refusal to satisfy, recover damages. It cannot be said that a mortgagee has no right to be mistaken as to the amount due. *Crain v. McGoon*, 29 Am. Rep. 37.

The construction contended for seems to be settled by the case of *Crumbly v. Barden*, *supra*; but it will be claimed that in Wisconsin there is no statute providing that a tender kept good extinguishes an obligation. It is submitted that our law on this subject is merely declaratory of the common law.

*W. H. Cobb* and *McLaughlin & Noyes*, for respondents.

The term "satisfied" is one of broad meaning, and used to cover conditions of different instruments. Mortgages may be given as security for any obligation. When given to secure the payment of money, then, certainly, "satisfied" means "paid," but by section 849, C. C., an offer of payment is equivalent to payment under the conditions there stated, which have been complied with by these respondents.

Counsel rely upon *Crumbly v. Barden*, but the case loses its force when the Wisconsin statute is compared with ours. See R. S. Wis., § 2256 (1878). An offer to perform there has only the effect of carrying costs when pleaded. *Id.*, §§ 4265-9. It does not, as here, extinguish the obligation. Further, in Wisconsin, statutes that are penal in their nature are strictly construed. *Stone v. Lannon*, 6 Wis. 497. That is not the rule here. § 602, Cr. Pro.

CARLAND, J. The respondents commenced an action in the



district court of Walsh county against appellant to recover the statutory penalty prescribed by section 1735, Civil Code. Subdivision 6 of that section is as follows: "6. When any mortgage has been satisfied, the mortgagee or his assignee must immediately, on demand of the mortgagor, execute and deliver to him a certificate of the discharge thereof, and must, at the expense of the mortgagor, acknowledge the execution thereof so as to entitle it to be recorded, or he must enter satisfaction, or cause satisfaction of such mortgage to be entered of record; and any mortgagee or assignee of such mortgage, who refuses to execute and deliver to the mortgagor the certificate of discharge, and to acknowledge the execution thereof or to enter satisfaction or cause satisfaction to be entered of the mortgage as provided in this chapter, is liable to the mortgagor, or his grantee or heirs, for all damages which he or they may sustain by reason of such refusal, and also forfeit to him or them the sum of one hundred dollars."

The respondents in their complaint alleged, among other averments, "that the said mortgage became due and payable on the 1st day of November, 1887; and that, on the 7th of February, 1888, at the office of defendant, in the court-house in the city of Grafton in said county and territory, and before the commencement of this action, the said mortgage being then past due, and there was then due thereon \$101.25, and no more, these plaintiffs tendered to the defendant mortgagee, he being then owner and holder thereof, and the debt secured thereby, one hundred and one dollars and twenty-five cents in lawful money of the United States, in full payment of the amount due on the said mortgage, and in full satisfaction thereof, with all accrued costs; and that said sum was full payment of said mortgage, and full satisfaction thereof; and that these plaintiffs have always been, and still are, ready and willing to pay the same to defendant; and immediately deposited the said sum of one hundred and one dollars and twenty-five cents in the name of the defendant in a bank of deposit of good repute within this territory, to-wit: the First National Bank of Grafton, in the city of Grafton, in said county and territory; and that due notice thereof was there and then given to the defendant; and that said deposit has ever since so remained, and now remains, in the name of the defendant aforesaid."

To the complaint of the plaintiffs in the court below the defendant demurred, alleging as ground of demurrer, that the complaint did not state facts sufficient to constitute a cause of action. After argument, the demurrer was overruled; and, the defendant electing to stand on the demurrer, judgment was entered against him and he appealed to this court.

The argument made in support of the demurrer in the court below, as well as here, was that a valid tender under the laws of Dakota was not a *satisfaction* of the mortgage within the meaning of the statute above quoted. The defendant in the court below admitted by his demurrer the paragraph of the complaint set forth in this opinion, and thus admitted that plaintiffs had made him a valid tender of the correct amount due on the mortgage, and the single question is now presented to this court: Did the valid tender of the correct amount due on the mortgage satisfy it so that, upon the refusal by the defendant to enter satisfaction of record or to execute a certificate of the discharge thereof, the plaintiffs would be entitled to recover the statutory penalty?

Section 849, Civil Code, provides as follows: "An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor with some bank of deposit within this territory, of good repute, and a notice thereof is given to the creditor." It is admitted by the demurrer that the respondents literally complied with this statute. The debt, therefore, to secure which the mortgage was given, was extinguished.

Was the mortgage satisfied? Webster defines the word "satisfy" as follows: "To comply with the rightful demands of; to give what is due to; to answer or discharge, as a claim, debt, legal demand, or the like; to pay off; to requite, as to satisfy an execution." Now, to comply with the rightful demands of a person, to give him what is due him, to answer or discharge his claim, debt, or legal demand, is doing nothing more than extinguishing the claim he has upon me, whether it be of a financial or moral nature; therefore, if I have extinguished an obligation existing against me in a legal manner, I have satisfied it. If the obligation to which the mortgage was an incident has been satisfied, it follows that the mortgage has also been satisfied, in the same sense

that an execution is satisfied upon the payment of the judgment on which it was issued.

By section 2256 of the Revised Statutes of Wisconsin as amended by chapter 100, Gen. Laws Wis. 1883, it is provided that, "if any mortgagee, his personal representative or assignee, after a full performance of the conditions of the mortgage, \* \* \* shall \* \* \* refuse," etc., "he shall be liable to the mortgagor, his heirs and assigns, in the sum of \$100." Under this section the supreme court of Wisconsin, in *Crumbly v. Bardon*, 70 Wis. 385, 36 N. W. Rep. 19, held that an allegation of tender, in an action by the mortgagor, would not bind the mortgagor within the provisions of the section last quoted. The case is not parallel with the one at bar. The legal effect of a tender is not the same in Wisconsin as in Dakota. A tender in Wisconsin, as we understand sections 4265, 4269 of the Revised Statutes of Wisconsin, would simply affect the question of costs in a case like the one at bar, and, therefore, a tender would not be a "full performance of the conditions of the mortgage."

It is argued by appellant that to hold that a valid tender, under the laws of this territory, is a satisfaction of the mortgage, imposes upon the mortgagee a harsh rule, for the reason that the mortgagee must, when a tender is made him, determine at his peril whether he will accept it, or run the risk of paying the penalty. This result does not follow. The money that is tendered is deposited in bank to his order. He can take the money at any time after he is satisfied it is the correct amount; and if, before he is satisfied of the correctness of the amount, a demand is made upon him for a discharge of the mortgage, and he refuses, and action is brought by the mortgagor for the penalty, we should hold that, if he could show that his refusal was in good faith, and made in the honest belief that the mortgage was not entitled to be discharged, he would not be liable to the penalty, as the refusal of the mortgagee or his representative, under subdivision 6 of our statute, must be intentional and willful in order to incur the penalty. In the case at bar the appellant admitted that the correct amount was tendered; and, having admitted this, we must presume that he knew it was the correct amount; and his refusal, in the face of this knowledge, entitled the respondents to judgment.

The judgment of the lower court must, therefore, be affirmed.

All concur.

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THE CAPITAL BANK OF ST. PAUL, Respondent, v. SCHOOL DISTRICT  
85 OF CASS AND BARNES COUNTIES, Appellant.

**1. Municipal Corporations — School Districts — Implied Powers.**

Though there may be no express power given to the district to provide furniture for the school-houses, under the act to establish public schools (chap. 14, Laws 1879), still, the general purposes of the act would necessarily imply this power, and authorize incurring obligations to that end.

**2. Same — Warrants in Excess of Revenue — Validity — Ratification.**

Where, by § 29, subds. 5, 8, chap. 14, L. 1879, the revenue a school district can raise in any one year is limited, and this limit had been exceeded by warrants of one issue for necessary improvements being made, but before the completion of the improvements two years had elapsed, and the amount of the warrants did not exceed the revenue that could have been collected for that period, *held*, the warrants were valid where the action of the school board in the premises had been approved by the district, and it had accepted and used the improvements. *Held, also*, that the inhabitants of the district had the power to ratify the action of the board.

(Argued May 12, 1887 ; affirmed May 25, 1888 ; opinion filed June 3, 1889.)

**A** PPEAL from the district court, Cass county ; Hon. W. B. McCONNELL, Judge.

Action to enforce payment of school orders. Defense, that such orders were issued by the school board without authority. Plaintiff had judgment on trial by the court without a jury, and the defendant appealed.

*C. E. Joslin (M. W. Greene of counsel), for appellant.*

A municipal corporation can exercise the following powers only: (1) Those granted in express words ; (2) those necessarily implied in or incident to powers expressly granted ; and, (3) those essential to the declared objects and purposes of the corporation — not simply convenient, but indispensable. 1 Dill. Mun. Corp., § 89.

There was no authority to issue these orders, and persons purchasing them are held to notice of that fact. School District v.

6	248
1n	488
42*	774
48*	865

School District (Neb.), 11 N. W. Rep. 311; Hopper v. Town of Covington, 8 Fed. Rep. 777; School District v. Thompson, 5 Minn. (Gil.) 221; Union School District v. First Nat. Bank, 2 N. E. Rep. 194. The only way for the district to have made the improvements was by taxation. 1 Dill. Mun. Corp., §§ 117, 120, 125, 136; Williamsport v. Commonwealth, 84 Pa. St. 487; Ganse v. City of Clarksville, 5 Dill. 165; Fuller v. Chicago, 89 Ill. 282; Springfield v. Edwards, 84 id. 626; Low v. People, 87 id. 385.

There is nothing in the nature of municipal corporations which favors implied power to borrow money, and issue commercial paper therefor. Burroughs, Pub. Sec. 172, 173, 176, 177; Ketchum v. City of Buffalo, 14 N. Y. 356; Town v. Swackhamer, 37 N. J. L. 191; Dent v. Cook, 45 Ga. 323.

The sale of such securities is regarded as a borrowing. Burroughs, Pub. Sec. 185, 191, 192; Dillon, Mun. Bonds, § 6; Jones, R. R. Sec., § 283; Clemens, Corp. Sec. 26, 28; Nashville v. Ray, 19 Wall. 468.

There could be no ratification as there was no power to issue the orders. § 1351, C. C. See also Green's Brice's *Ultra Vires*, 546, n. a, 549, 550; Taymouth v. Koehler, 35 Mich. 22; Tracy v. Guthrie, 47 Ia. 27; Cook v. Tullis, 18 Wall. 332; Wood v. McCain, 7 Ala. 706; Taylor v. Robinson, 14 Cal. 396; McCracken v. San Francisco, 16 id. 591; Tailor v. District, 25 Ia. 450-451; Hopple v. Brown Township, 13 Ohio St. 328; Treadwell v. Commissioners, 11 id. 190.

Though appellant admitted the orders were not strictly *ultra vires*, still the facts disclosed would not warrant a finding of ratification.

*White & Hewit* (C. K. Davis and A. D. Thomas of counsel), for respondent.

There is a broad difference between the cases cited by counsel and the one at bar. Here the orders are issued under a general law giving the district the power to do so. The law of 1879 was in force and neither repealed nor modified by the bonding act of 1881, but additional power was given. See Laws 1879, chap. 14, §§ 21, 39, 44, 52. Having the power then, they are presumed to have been issued upon a consideration, and any defense must be

pleaded and proved. Dan'l, Neg. Inst., § 31; Commissioners v. Day, 19 Ind. 451; Clark v. City of Des Moines, 19 Ia. 199; 1 Dill. Mun. Corp., §§ 501-2; Burroughs, Pub. Sec. 638.

Here the only limitation of the statute was on the amount of taxes that could be collected for any one year, not the amount that could be expended. This will be found to distinguish many of appellant's cases and not affect the order in suit. Robbins v. School District, 10 Gil. (10 Minn.) 268; Regents v. Hunt, 7 Gil. 45, 48, 49; Dillon, Mun. Corp., § 485; Mullarky v. Town, 19 Ia. 21; Sturtevant v. City, 3 McLean, 393; Galena v. Corwith, 48 Ill. 423; Commonwealth v. Councils, 41 Pa. St. 278; Bank v. Town, 7 Ohio, 354; Clark v. School District, 3 R. I. 199.

The facts disclose a ratification by the district. Bicknell v. Widner, 73 Ind. 501-5; Wallis v. Johnson, 75 Ind. 368; Norton v. Shelby County, 6 Sup. Ct. Rep. 1132; Greene's Brice's *Ultra Vires*, 724; Herman, Estop. 1218, 1310, 1313, 1367; 2 Smith, L. C. 459; Story, Ag., §§ 255, 256; Wheeler v. Hall, 41 Wis. 447, 451.

If the district had the power to erect the building, it had the power to ratify the act. Norton v. Shelby County, 6 Sup. Ct. Rep. 1121, 1129-30; Herman, Estop. 1218, 1367.

SPENCER, J. (*After stating the above facts.*) From the evidence in this case and the findings of the trial court it appears that the defendant in this action is, and since May, 1882, has been, a school corporation, organized regularly under and in accordance with the laws of this territory; that on May 26, 1882, the inhabitants of said district lawfully assembled, elected the proper and necessary officers of such school district as provided by law, selected a site for a district school-house, voted a tax of 1¢ on the taxable property of such district to pay for such site, and build a school-house, and subsequently, to-wit: August 12, 1882, at a meeting of such inhabitants, they voted to issue bonds in the sum of \$1,500, and directed the proceeds thereof to be applied on the debt incurred for such site, school-house, and furniture for the same; that such bonds were duly issued and negotiated by the school board, and the proceeds received by them; that the defendant obtained title to such school-house site June 8, 1882, and that on that day, and for the purpose of paying for such site, and to obtain funds with which to pay for such school-house and

furniture for the same, the officers of such school board — the director and clerk — issued and delivered to one E. C. Northup the five orders in suit, each for \$500; that said orders were duly presented to the treasurer of said school district for payment, which was refused for want of funds, and so indorsed by said treasurer, and who also indorsed upon each of said orders the following: "This order draws 10% interest from this date, June 8, 1882." On the same day these orders were negotiated, and sold to the plaintiff in this action by one of the directors of defendant, for \$2,300. The proceeds of these orders, concededly, were used by the school board in payment for the site, school building, and furniture. The proceeds of the bonds were not used for such purpose, nor were they used in the payment of said orders, nor does the record disclose any purpose for which these bonds or the proceeds thereof were used, or whether used at all. It does, however, appear affirmatively that they were not used in purchasing the site for the school-house, or erecting the building, or furnishing it, or in payment of any of the orders in suit. The title to the site selected by the inhabitants of the district was duly obtained in the name of the district, the school-house erected, completed, and furnished early in 1883, and immediately thereafter taken possession of by defendant, and has at all times since been used by it for school purposes, school meetings, and kindred objects. That on June 30, 1884, at the annual meeting of said district, the treasurer submitted his report of the proceedings of said school board, by which it appeared that orders for \$2,800 had been issued and sold, including the orders in suit or the proceeds thereof, and that the whole of such sum had been expended for a site, school building, and the furniture thereof, and which report was accompanied by the vouchers for such expenditures. At such meeting such report was, with full knowledge of all that had been done and all expenditures made, accepted, audited, and allowed.

On the trial of the action the plaintiff had judgment for the full amount of said orders, including the interest thereon, and the defendant appealed to this court.

The principal grounds of error relied upon by the defendant for a reversal of this judgment are two, viz.: *First*, that the school board exceeded its authority in issuing orders for a greater



amount than 1% on the taxable property of the district for the purpose of purchasing a site and building a school-house; *second*, that the defendant had no authority or power to ratify the action of its school board in issuing such orders, so as to make them chargeable against the school district. •

Upon the former of these propositions the true rule doubtless is that corporations of the character of the defendant have only such powers as are expressly granted by the law providing for their creation, and such others as must necessarily be implied to have been given them in order to carry the purposes of their organization into effect,—such as are incidental to the exercise of the powers expressly granted or necessarily implied to effect the purpose and object for which the corporation is created.

Did the defendant exceed its authority by voting the orders in question or ratifying the act of its school board in doing so? By subdivision 5, section 29, chapter 14, Laws 1879, it is provided that the inhabitants of school districts may vote annually a tax of 1% on the taxable property of the district to purchase or lease a site for a school-house, etc.; and by subdivision 8 of said section it is provided that school districts may vote a tax as may be necessary to furnish the school with black-boards, stoves, maps, furniture, and apparatus necessary for illustrating the principles of science, and to discharge any debts or liabilities of the district lawfully incurred, such tax, however, not to exceed  $\frac{1}{2}$ % in any one year on the taxable property of the district. There is not otherwise than in this subdivision any positive authority conferred upon school districts under this law to provide the school-houses, which may be or have been erected, with furniture at all; and yet it cannot be doubted that though nothing whatever had been said upon the subject of furniture for these school-houses in the law itself, that, under the general powers conferred, the school district or its proper officers would have the authority and right to furnish such school-house properly, and make the property of the district chargeable with the necessary expense of doing so. This would indisputably have been the proper exercise of an incidental power granted, for there is perhaps no positive grant of such power, but its exercise is necessary, to the end that the object of the law may be fulfilled.

It appears from the record that the proceeds of the orders were in fact all used to purchase and pay for the school-house site selected, to erect the school building, and purchase the necessary furniture for it. What proportion of the fund was used for each is not disclosed, and thus we are unable to determine whether more than 1% on the taxable property of the district was used in purchasing the site and building the school-house or not, or what part was used in purchasing furniture, apparatus, or appendages; nor can we presume that the sum actually expended was not, in fact, necessary for the several purposes stated, and used in pursuance of the several powers granted, and those necessarily implied for the effective operation of the powers granted intended to provide means for the education of the young. It will be observed and borne in mind that the defendant obtained title to the land comprising the site on which the school-house was built on June 8, 1882, and that the erection of the school-house began on the 13th of the same month, but that it was not completed and furnished until 1883, and the vote of the inhabitants of the district, accepting and adopting the report of the expenditures of the proceeds of these orders, was not taken until June 30, 1884, more than two years after the orders in controversy were issued. For these two years the district had the power under the statute to expend in the aggregate, for a site, school-house, and furniture, a sum greater than the whole amount of orders drawn, viz., 1% on the taxable property of said district for a site and school-house in 1882, and a like amount for such purpose in 1883, and  $\frac{1}{2}\%$  on such property for furniture during each of said years. See subs. 5, 8, § 29, chap. 14, Laws 1879. Doubtless, under these provisions of the statute, the district had the power, and in each of the years 1882 and 1883 might have voted in the aggregate  $1\frac{1}{2}\%$  on the taxable property of the district for a site, school-house, and furniture, which would have amounted to considerably more than the face value of the orders issued. The district did not do this, but it did select a site, and direct the construction of a school-house thereon. The site was purchased, and the school-house constructed and furnished, by the school board. In doing this they expended more money than could legally have been collected by tax on the

property of the district for one year, but not so much as might have been made chargeable and collected in the aggregate during the two years intervening from the time its construction began until it was finally completed, and when it was completed, and a report of the orders issued, and all the expenditures made were reported; the same being less than the amount which they might have expended for the two years during which the school-house was being constructed. Did not the district have the power to ratify the acts of its board, and did it not do so by accepting and adopting the report made, and using and occupying the school building? Suppose the district had authorized the issue of one-half of these orders in 1882, and the residue in 1883, for the purposes for which they were used. Doubtless they would have been valid. And so they might have raised by tax in 1882, for the purposes of purchasing a site and building a school-house, such sum as the law permitted on the taxable property of the district, and they could have repeated the process the next year, had they so desired, and so continued until they had obtained such a school-house as satisfied the necessities of the district. And so had the district voted and collected the amount it could have done according to this law, in each of the years 1882 and 1883, and had the same in its treasury, doubtless it might legally have appropriated such portion of it as might have been necessary to pay for the site, school building, and its proper furniture, or to have paid the orders in suit, so long as it did not exceed the aggregate amount which had been collected under the law. This is, we think, substantially what the district did by its vote, accepting and adopting the acts of its officers, June 30, 1884.

These officers, during the years 1882 and 1883, had constructed and furnished a school-house upon a site selected by the inhabitants of this school district. In doing this they used, without authority, perhaps, of the district, school orders purporting to represent the credit of the district, though not to any extent greater than the district itself might have used them in the aggregate during the time of the construction of the school-house.

Upon the completion of the school-house the school board reported the number of orders issued, and the amount of each, the amount of proceeds received from them, and the uses to which

such proceeds had been put (showing that they amounted in gross to a less sum than the district might have issued themselves during the time the school-house was in process of construction); that the proceeds were all used, in fact, in purchasing the site selected by the district, and building and furnishing a school-house. Under these circumstances, and with knowledge of these facts, the district accepted and occupied the school-house, and adopted and approved the report. This, we think, was a sufficient ratification of the act of the school board by the district; and under the facts of this case, as disclosed by the evidence and found by the trial court, the inhabitants of the district, at their school meeting of June 30, 1884, had the power to ratify the acts of these officers in issuing the orders in question, and expending the proceeds for the construction and furnishing of the school-house on the site selected by the district.

The following cases are important, as bearing upon the question involved in this appeal: *Robbins v. School Dist.*, 10 Minn. 340 (Gil. 268); *Norton v. County of Shelby*, 6 Sup. Ct. Rep. 1132; *Holmes v. City of Shreveport*, 31 Fed. Rep. 113.

We find no error in the record, and the judgment appealed from must, therefore, be affirmed. All of the justices concurring. Judgment affirmed, with costs.

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FARMERS AND MERCHANTS' NATIONAL BANK OF VALLEY CITY, D.  
T., Appellant, v. SCHOOL DISTRICT No. 53, Respondent.

**1. Municipal Corporations — School Districts — Powers.**

School districts being special statutory creations, have only such implied powers as are necessary to accomplish the purposes of their existence.

**2. Same — Warrants, Validity.**

Where the statute, § 29, subd. 4, chap. 14, L. 1879, required that the voters of a school district should select a site for a school-house, and the district board, without this having first been done, selected it, built a house and issued warrants therefor without the authority or ratification of the voters, *held*, the warrants were void.

**3. Same — Exceeding Revenue.**

Where by § 29, subd. 5, chap. 14, L. 1879, there was a restriction on the amount of revenue a school district might raise in any one year, and a board in issuing certain warrants payable immediately, exceeded this limit, *held*, the warrants were void.

6	255
1n	28
1n	485
1n	488
1n	495
42*	707
44*	1002
48*	364
48*	365
48*	367

**4. Same — Estoppel.**

A school district, in an action against it on its warrants, will be permitted to defend on the ground that the warrants were issued in excess of its powers.

**5. Same — Rights and Duties of Purchasers of Warrants.**

Persons purchasing obligations apparently issued by municipal corporations must see that the powers of the corporation have not been exceeded.

(Argued May 18, 1887; affirmed May 25, 1888; opinion filed June 3, 1889.)

**A** PPEAL from the district court, Barnes county; Hon. W. H. FRANCIS, Judge.

*J. W. Scott, White & Hewit and C. K. Davis*, for appellant.

The question of title to the land on which the building is situated is not a proper issue. If it were, the burden is on the respondent to show that the land built on is not the land furnished by the district, which it has not done. *Todd v. Greenwood*, 40 Mich. 294.

If the land did not belong to the district, the contractors were not in fault and cannot be made to bear the loss. Laws 1879, chap. 14, § 57; *Ferree v. Sixth W. S. Dist.*, 76 Pa. St. 376.

The lack of authority to issue these orders is not raised by the pleadings and not in the case. In any event the *onus* would be on respondent to show affirmatively that the power did not exist.

The authority is derived from the law of 1879 and 1881. See Laws 1879, chap. 14, §§ 39, 44, 52, 56.

Each order expresses on its face the purpose for which it was issued and is drawn on a fund recognized by the statute. Having authority to issue orders, *prima facie*, they are valid; any defense to them must be pleaded and proved. *Dan'l, Neg. Inst.*, § 31; *Commissioners v. Day*, 19 Ind. 451; *Clark v. City*, 19 Ia. 199; 1 Dill. Mun. Corp., §§ 501-2; *Burroughs*, Pub. Sec. 638; *Wall v. County*, 103 U. S. 74, 77; *Mayor v. Roy*, 19 Wall. 468, 480.

It is claimed the district was restricted in the issuance of orders to the amount that could be raised by the tax of any one year. Laws 1879, chap. 14, §§ 29, 56. This is not by any means a limitation of the value of a building to be built. Sections 29, 39, 44, 52 and 56 must be construed together. Section 44 contains no

limitation as to the class of orders to be drawn, and gives the power to draw orders payable in future, bearing interest from the date of presentation. The case of *Kane v. District*, 9 N. W. Rep. 459 (52 Wis. 502), cited, is under a law very different from ours. The court in that case refers to sections 34, 42, ch. 23, Taylor's Statutes, pp. 550, 551, and section 51, p. 555. By these sections the power to issue orders is restricted to money in the hands of the treasurer. In Wisconsin there is also a distinct provision for borrowing needed funds.

The case of *Robbins v. School District*, 10 Minn. 268, is decisive of this question. That case construes our sections 29 and 56. These sections came from that state after this construction. See also *Regents v. Hunt*, 7 Gil. 45; *Mullarky v. Town*, 19 Ia. 21; *City v. Corwith*, 48 Ill. 423; *Madison v. Watertown*, 5 Wis. 173; *Clark v. School District*, 3 R. I. 199; *Mills v. Gleason*, 11 Wis. 470, 491; *Wall v. County*, *supra*; *Mayor v. Ray*, *supra*; *Bank v. Town*, 7 Ohio, 354.

But even were the orders executed without authority, it is proven they were given in payment of the building and furniture in accordance with the terms of the contract, and were afterward accepted and used by the district, they must, therefore, pay the orders. *Mayor v. Ray*, *supra*; *Bicknell v. Widner*, 73 Ind. 501-5; *Greene's Brice's Ultra Vires*, 724; *Wallis v. Johnson*, 75 Ind. 368; *Story, Agency*, §§ 255-6; *Herman, Est.* 1218, 1367; *Mills v. Gleason*, *supra*; 2 *Smith, Lead. Cas.* 459, i; 1 *Dill. Mun. Corp.*, § 537 (3d ed.).

*F. H. Remington*, for respondent.

The primary object of warrants is not to provide a means for borrowing money, but to afford a method of drawing it from the treasury and furnishing the treasurer vouchers for its payment. They are not negotiable instruments and purchasers take them subject to all defenses. *Dill. Mun. Corp.*, §§ 487, 488, 503, 504, 961; *Clark v. Des Moines*, 19 Ia. 199; *Scheffield v. Andrus*, 56 Ind. 157; *School District v. Stough*, 4 Neb. 357; *National St. Bank v. Ind. Dist.*, 39 Ia. 490; *Field, Ultra Vires*, 442.

At the time these warrants were issued there were also issued five others of \$500 each, transferred to another party and still out-

standing, making in all \$6,000 for building and furnishing a school-house. The assessed valuation of the district at the time was \$18,305. The inhabitants of the district did not direct their issue, nor the making of the contract; neither did they designate a site for the school-house.

Under these circumstances there was no authority to issue the warrants. The district is to be held strictly within its powers. *School District v. School District*, 11 N. W. Rep. 311; *Independent School v. Stone*, 106 U. S. 9; *Gehling v. School Dist.*, 4 N. W. Rep. 1023; *Wolf v. Independent School Dist.*, 1 id. 695; *School Dist. v. Thompson*, 5 Minn. (Gil.) 221; *Dill*, § 21; *Hopper v. Town*, 8 Fed. Rep. 777; *Clark v. Des Moines*, and *Field*, *Ultra Vires*, *supra*; *Treadway v. Schnauber*, 1 Dak. 236, 248.

Persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation or its officers to make the contract. *Dill*, § 447; *Anthony v. County*, 101 U. S. 1005; *Union School v. First Nat. Bk.*, 2 N. E. Rep. 194; *Wallis v. Johnson*, 75 Ind. 368; *State v. Commissioners*, 25 N. W. Rep. 91.

The amount that the district may raise by taxation, Laws 1879, chap. 14, §§ 29, 56, is restricted, as in Wisconsin. The supreme court of that state, under a similar statute, in *Kane v. School Dist.*, 52 Wis. 502, 9 N. W. Rep. 459, held as we contend. See, also, *School District v. Stough*, 4 Neb. 357.

There seems to be some conflict between the case of *Robbins v. School District*, 10 Minn. (Gil.) 268, and the Wisconsin and Nebraska cases, but however that may be, the case at bar does not come within the Minnesota rule, as an examination will disclose.

The mere fact of using some of the property is no proof of ratification. *Kane v. School District*, *supra*; *Johnson v. School District*, 67 Mo. 319.

Neither can the doctrine of estoppel have any application to this case. *Dill Mun. Corp.*, §§ 457, 503, 504; *Union School v. First Nat. Bank*, *supra*; *Clark v. City*, *supra*; *Field*, *Ultra Vires*, 442; *Cummins v. City*, 79 Ind. 491, 497.

SPENCER, J. This is an appeal from a judgment dismissing the complaint on the merits. The action was brought to enforce the



payment of certain school warrants alleged to have been issued by the defendant through its school board. A jury having been waived, the cause was tried by the court, and findings of fact made that the inhabitants of the district did not direct the making of or make the contract under which the school-house was erected, did not consent to it, did not select or authorize the selection of the site upon which it was erected, and had never in any way ratified the acts of the school board in issuing such warrants or constructing such school-house; and, as matters of law, that such warrants were issued without authority of law, and were fraudulent and void. Judgment upon such findings was duly entered in favor of the defendant, and the plaintiff appealed.

Upon a careful examination of the facts in this case, and the law of this territory defining how and under what circumstances school districts and school boards may erect school-houses, and issue orders or warrants binding upon the districts in payment thereof, we are of opinion that the orders upon which this action was brought are invalid, and that the plaintiff is not entitled to recover.

The defendant was organized, if ever, under and in pursuance of chapter 14 of the Laws of 1879. By section 29 of said chapter, subdivision 4, it is provided that the inhabitants qualified to vote at a school-district meeting, lawfully assembled, shall have power to designate by vote a site for a district school-house; and, by subdivision 5 of said section, to vote a tax annually, not exceeding 1%, on the taxable property in the district, as the meeting shall deem sufficient, to purchase or lease a site for a school building. This section, and the subdivisions referred to, embrace all the law of this territory upon the subject of selecting sites for school-houses for the several districts. By section 56 of said chapter 14 it is made the duty of the district board of such school district "to purchase or lease such site for a school-house as shall have been designated by the voters at a district meeting, in the corporate name thereof, and to build such school-house as the voters of the district in a district meeting shall have agreed upon, out of the funds provided for that purpose."

School districts are corporations created for special purposes, and have only such powers as are specially granted by legislative

enactment, and those that are necessarily implied to accomplish the objects for which they are created. The specification of these powers by the statute under which they are organized restrains them from the exercise of other powers than those granted, and such as must be implied to enable them to effect the object of the grant, and operates to restrain them from the exercise of other powers, and, in the discharge of their duties and the exercise of the powers granted, they are governed and restrained by the provisions of the law under which they are created. When the law specially defines their powers, the legal presumption is that they are prohibited from the exercise of any others than those absolutely essential to enable them to accomplish the purposes of the grant. *People v. Insurance Co.*, 15 Johns. 383; *Insurance Co. v. Ely*, 2 Cow. 699; *School Dist. v. Stone*, 106 U. S. 183, 1 Sup. Ct. Rep. 84; *School Dist. v. Thompson*, 5 Minn. 280 (Gil. 221).

Under this interpretation of the law upon this subject, what powers had this school district under the statute aforesaid? The inhabitants of the district qualified to vote at a school meeting, when lawfully assembled for that purpose, had the right and power to select a site for a school-house, and to agree upon such plans as they could for a school building, and provide funds within the limits fixed by the legislature for purchasing or leasing such site, and the erection of such school-house. This law also provides for the election by the inhabitants of such school district of a board of officers, and specifies the duties of each. Such officers, as a district board, are to purchase or lease such site for a school-house "as shall have been designated by the voters at a district meeting." From the provisions of this statute it is very clear that the intent of the legislature was that the inhabitants -- the legal voters of the school district, as contradistinguished from the district board -- should alone have the power and right to select a site for a school-house, and that until they had exercised that right the district board were powerless in the premises; else it would not have used the language: "The district shall purchase or lease such site as shall have been designated by the voters at a district meeting, and erect such school-house as the voters of the district in a district meeting shall have agreed upon." This is

the reasonable and natural construction of the statute, and the only one which will give effect to all its provisions. The site having been selected, and the plan of school-house agreed upon, then, and not until then, did it become the duty or could the district board exercise legally the right to purchase a site or erect a school-house. The prime object of the creation of the district board was to enable the district to carry out the wishes of the inhabitants of the district as expressed at its meetings, and to consummate such bargains for the purchase of a school-house site and the building of a school-house as the legal voters of the district should direct. The statute does not mention any instance in which the district board may select a site for the school-house or erect the school building, except upon the sanction of the voters of the district and their effort to arrogate to themselves the powers conferred upon the inhabitants of the district was without the shadow of legal right or authority. The evidence shows, and it is found as a fact by the trial court, that the inhabitants of the district did not designate a site for a school-house, did not direct the making of the contract for the erection of the school building, or the issuance of said warrants, nor authorize or ratify said transaction in any way ; and it is found as a fact, and is undisputed, that the school-house in question was situated upon land to which the defendant never had any title, nor the right to occupy it ; and hence they do not own the school-house, and would not if they paid the warrants, and have not the power to ratify these illegal acts of the school board.

We have not been referred to any law giving the district boards power to select sites for school-houses, nor have we been able to find any such law, after diligent search. The powers of the district board are enumerated in sections 59 to 64, inclusive, of chapter 14, Laws 1879, and in none of them, or elsewhere, is there any provision conferring upon the district board, in any contingency, any authority to create obligations against the district for building school-houses or purchasing sites. Section 62 empowers the district board to provide the necessary appendages for the school-house during the time school is taught there, but the same are to be presented and allowed, if reasonable, at the regular district meeting. Section 39 provides that the director of the school dis-

trict shall sign orders drawn by the clerk, authorized by the district meeting or by the district board, upon the treasurer for moneys collected or received by him; and section 44, that the clerk shall draw all warrants or orders for the payment of money for teachers' wages, or any other purposes legally ordered by the school board, or by the voters at a district meeting. We have seen that the district board may direct orders to be drawn to carry out the will of the school district when ascertained. They may also, undoubtedly, direct orders to be drawn in payment of teachers' wages already earned, and in payment for appendages, after the bills for the same have been duly presented at a district meeting, and allowed. Items of this character may undoubtedly be allowed by the district, even though there be at the time no funds in the treasury to pay them. Being audited and presented, if there are not funds sufficient to pay, the law provides they shall draw interest. It is apparent that this is the intent the legislature had in making the law. This construction of the statute gives effect to all its provisions. It enables school sites to be selected, school buildings to be constructed, teachers to be employed, and all the machinery necessary for successfully carrying on these institutions of learning to be acquired, and leaves it to the inhabitants of the district, who are to bear the burdens of maintaining the system, to determine how, under the law, the interests of the common schools can be best fostered and preserved. The fact that the legislature has in no place, nor under any circumstances, clothed the district board with power to create debts that should be binding obligations upon the district, except by and with the consent of the inhabitants of the district, is sufficient evidence that it supposed the authority to incur obligations would be more wisely exercised by those who had them to pay than by a board which peradventure might in that regard be moved by some ulterior purpose. In any event, the legislature, within the statutory limitations, has left this matter entirely with the inhabitants of the district, and empowered the district board to act only in consonance with the will of the voters of the district, as expressed at the district meetings. The district board in issuing these orders acted without any authority whatever, and such orders are, therefore, invalid for any purpose.

Again, by the statutes mentioned, the school districts are restricted in the amount of obligations they may incur, to be paid in any one year, to 1½% on the taxable property of the district. The taxable property of this district was \$18,305, and each of the orders sued upon exceeded the statutory limit, and was payable immediately. We think it was the purpose of the legislature to restrict, within the limits specified by the statute, the amount of actual expenditures which could be made by the district in any one year. Any other construction of this statute would be equivalent to holding that it has no force or effect, and that school districts or school boards may incur any amount of indebtedness, and bind the district with its immediate payment. In order to give effect to these statutory restrictions, it is essential that school districts and their officers shall be restricted from contracting debts to the limit of the law, and in this view we are supported by *Kane v. School District*, 52 Wis. 502, 9 N. W. Rep. 459, where we find this language applied to a statute very similar to the one we are considering: "It seems to be the policy of the laws of this state to restrict the expenditures \* \* \* by fixing a limit to the amount which can be lawfully collected from the tax payers of the district for school purposes in any one year. To give proper force to these legislative restrictions, it would seem necessary to restrain the district as well as its officers from contracting debts drawing interest which can become a lawful charge upon the future resources thereof." But we are not called upon to go so far in the case at bar. The question here is whether the district had power to incur liabilities not only greatly in excess of the statutory limit, but to bind the district with their immediate payment. This is a different question from that presented in *Robbins v. School District No. 1*, 10 Minn. 340 (Gil. 268). But that case rather sustains the defendant's position here than otherwise. It holds merely that the inhabitants of the district, at a district meeting, could incur a greater indebtedness to be paid in the future than could be met by the tax levied for one year; thus deciding, substantially, that the district could not incur a debt to be paid in one year greater than the amount to be collected by levy and tax for such year according to the terms of the statute. In the case at bar, assuming that the district had authorized the

issuing of these orders, they would, under the reasoning in 10 Minn., have been void, because they created an obligation against the district, payable immediately, greater than could be realized from any tax they were empowered to levy for that year. They thus transcended their authority, and exercised powers which the statute not only did not confer upon them, but absolutely prohibited the exercise of by them. We, therefore, hold that these warrants are invalid on both grounds, viz.: *First*, that they were issued without the knowledge or consent of the district, and before the inhabitants thereof had, at a district meeting, selected a site for a school-house, and agreed upon a school building; *second*, because they exceeded  $1\frac{1}{2}\%$  of the taxable property of the district,—the maximum that could be levied and collected in any one year,—and were payable immediately, thus creating a present liability which was beyond the power of the school district or school board to incur. There is no doubt of the right of the corporation in such a case as this to set up its lack of power, under the law by which it is created, to enter into a contract sought to be enforced against. *Clark v. Des Moines*, 19 Ia. 199. And it is equally well settled that persons dealing with municipal corporations, or purchasing obligations apparently issued by them, must inquire into the powers of the corporations or their officers to make the contract, and when the want of power to make the contract is apparent from the charter or law under which the corporation is organized, or the obligations beyond the scope of the corporate power of the corporation, it is void and cannot be enforced. *Anthony v. County of Jasper*, 101 U. S. 693; *Clark v. Des Moines*, *supra*; *Marsh v. Fulton Co.*, 10 Wall. 676; *Hodges v. Buffalo*, 2 Denio, 110; *McCoy v. Briant*, 53 Cal. 247.

The conclusion we have arrived at renders an examination of the other alleged errors unnecessary. For the reasons stated, we are of opinion that the judgment of the court below was correct, and should be affirmed. Judgment affirmed; all the justices concurring.

## FELDENHEIMER, Appellant, v. TRESSEL ET AL., Respondents.

## 1. Equity — Creditor's Suit — Right of Action Under the Code.

Where a complaint in a creditor's suit alleged that the defendant T., at the time of incurring the obligation, was solvent; that thereafter he made conveyances of his property for the purpose of defrauding his creditors and pretended to have become insolvent; that the plaintiff had recovered judgment, issued execution thereon and the same had been returned unsatisfied; that prior to the rendition of the judgment, T. had purchased land with his own means and, for the purpose of defrauding his creditors, caused the conveyance to be made directly to his wife, who was cognizant of his fraudulent purposes, *held*, in an action against T. and his wife to subject the land to the payment of the judgment, that the complaint stated facts sufficient to constitute a cause of action, and that proceedings supplementary to execution would not afford an efficacious remedy in such a case.

## 2. Same — Supplementary Proceedings, Inadequacy of.

The design of supplementary proceedings is to summarily determine the property of the debtor liable to execution. Third persons cannot be made parties, nor can their rights, or titles, be passed upon therein. For the purpose of reaching equitable assets, or setting aside fraudulent conveyances, these proceedings do not afford an adequate remedy.

(Argued May 15, 1888; reversed May 25, 1888; opinion filed June 3, 1889.)

**A** PPEAL from the district court, Hutchinson county; Hon. BARTLETT TRIPP, Judge.

Creditor's bill. Demurrer that the complaint does not state facts sufficient to constitute a cause of action for the reason that the provisions of the Code of Civil Procedure in regard to proceedings supplementary to execution are a substitute for the remedy formerly afforded by creditor's bills and are exclusive of any other remedy by judgment creditors. The demurrer was sustained *pro forma* in the district court and the plaintiff appealed.

*R. B. Tripp*, for appellant.

The only question presented is, do supplementary proceedings furnish an adequate remedy for the facts stated? They do not. Freeman, Ex., § 394.

Mrs. Tressel, a third party to the original action, could not be bound by any order made in such proceedings. Burt v. Hoettinger, 28 Ind. 214; Gasper v. Bennett, 12 How. Pr. 307; Rodman v. Henry, 17 N. Y. 482-5. The legal title was never in the



debtor. In such case, in the absence of statute, his interest cannot be levied on and sold on execution; the only remedy is in equity. Freeman, Ex., § 136. That this action will lie where similar codes exist, see, also, Enright v. Grant, 15 Pac. Rep. 268; S. C., 16 id. 595; Twell v. Twell, 9 Pac. Rep. 537; Goodyear v. Betts, 7 How. Pr. 187; Bennett v. McGuire, 58 Barb. 625; Ludes v. Hood, 29 Kan. 49; Multnomah Ry. Co. v. Harris, id. 402; McCaskill v. Lancashire, 83 N. C. 393; Taylor v. Dunlap S. & L. Co., 16 Pac. Rep. 751.

Expressions may be found in the books to the effect that proceedings supplementary to execution are a substitute for the creditor's bill, but there are only two cases (Graham v. La Crosse & M. Ry. Co., 10 Wis. 459; Hexter v. Clifford, 5 Colo. 168) tending to sustain any such doctrine. From the disfavor these decisions have met in the states where rendered, they could hardly be regarded as possessing any authority. See Seymour v. Briggs, 11 Wis. 196; Gates v. Boomer, 17 id. 455; Allen v. Trich, 5 Colo. 222.

To hold this action would not lie would be to deprive the district courts of a part of their jurisdiction under the act of congress, R. S. U. S. § 1868; Enright v. Grant, *supra*; Frazer v. Colorado D. & S. Co., 5 Fed. Rep. 163.

*G. P. Harben*, for respondents.

The modes of proceeding were intended by congress to be left to the territorial legislatures. Hornbuckle v. Toombs, 18 Wall. 648; Davis v. Billsland, id. 659. The proceedings supplementary to execution being valid, and furnishing the only remedy here, this action must fail. The procedure adopted at the first session of the legislature, chap. 2, L. 1862, p. 131, the Ohio Code, expressly permitted this kind of an action. This chapter was repealed in 1867, on the adoption of the New York Code. This right of action does not now exist. In re Remington, 7 Wis. 643; Graham v. La Crosse & M. Ry. Co., 10 id. 459; Seymour v. Briggs, 11 id. 196; Reed v. Baker, 3 N. W. Rep. 959; Prescott v. Pfeiffer, 23 id. 477; Hexter v. Clifford, 5 Colo. 168; Harst. Pr., § 714; Adams v. Hackett, 7 Cal. 201; McCollough v. Clark, 41 id. 302;

Jonroy v. Woods, 13 id. 626; Hartman v. Oliver, 51 id. 504; 2 Estee (3d ed.), 22, n.

SPENCER, J. (*After stating the above facts.*) This is a bill filed by the plaintiff, as a judgment creditor, for the purpose of having declared void and set aside a conveyance of the defendants' lands, alleged to have been made fraudulently, and praying that such lands may be subjected to the judgment recovered by said plaintiff against the defendant John J. Tressel, previous to the filing of this bill, and that the same may be sold in satisfaction of plaintiff's judgment. The material allegations of the complaint are as follows: That the defendant John J. Tressel and one Stoner were copartners in 1884, engaged in the mercantile business under the firm name of Tressel & Stoner; that during the year 1884 said firm became indebted in the sum of several hundred dollars to the plaintiff; that at that time said firm, and particularly said Tressel, was solvent; that after said indebtedness was incurred the said Tressel purchased the entire interest of said Stoner in the property of the said copartnership, and became the exclusive owner thereof; that said Tressel pretended in 1885 to have become insolvent and unable to pay his debts; that during that and the following year he made false and fraudulent assignments and conveyances of his property for the purpose of cheating and defrauding his creditors; that he has concealed his property and by sundry mesne conveyances has invested his wife, the defendant Mary S. Tressel, with the apparent title thereto; that on May 3, 1886, the plaintiff, in the district court of this territory, recovered a judgment against the defendant John J. Tressel and said Stoner, and that such judgment was duly entered and docketed in the proper office; that execution was regularly issued upon said judgment to the sheriff of the proper county, and was before the commencement of this action returned wholly unsatisfied; that by reason of the fraudulent conveyance made by said defendant John J. Tressel said execution cannot be made or collected; that about April 8, 1886, said Tressel purchased of one Weisz certain real estate of the value of several hundred dollars, and paid the consideration therefor from his own funds, and became the owner thereof; but, instead of taking the title thereof to himself, pro-

cured the said Weisz to execute the conveyance thereof directly to his wife, said Mary S. Tressel, for the purpose of defrauding his creditors, and especially this plaintiff; that such deed was duly recorded, and the title remained in the name of said Mary S. Tressel at the time of bringing this action, though the premises are in fact the premises of said defendant John J. Tressel; that said Mary S. Tressel had knowledge of these fraudulent acts and purposes of said defendant John J. Tressel, and has assisted and colluded with him to defraud his creditors and this plaintiff.

To this complaint the defendants demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action, the particular ground of demurrer being that creditors' bills will not lie in this territory, for the reason that the provisions of the Code of Civil Procedure in regard to proceedings supplementary to execution have superseded the remedy by creditors' bills, and now furnish in this jurisdiction the exclusive remedy to judgment creditors to subject property to the satisfaction of their debts.

What were the powers of the court of chancery in reference to creditors' bills?

The court of chancery formerly had cognizance of bills filed by judgment creditors, after they had exhausted their remedies at law, to subject lands fraudulently conveyed to the payment of their judgments (*Edgell v. Haywood*, 3 Atk. 357; *Edmeston v. Lyde*, 1 Paige, 637); and by the filing of such a bill the creditor acquired a lien upon lands which were superior to any subsequent conveyance. Such bills were sustainable under the ordinary jurisdiction of the court. Its power to hear such cases and set aside fraudulent conveyances which stood as obstructions to executions at law was inherent in the court, and not dependent upon any statute. *Beck v. Burdett*, id. 305.

From its earliest history the court of chancery has exercised the power of compelling the transfer of the title to real estate by obliging parties holding the legal title to convey it, or by directing it to be sold by some officer of the court appointed for the purpose, or by declaring the title by which it was held fraudulent, and subjecting it to sale under an execution at law. *Mould v. Williamson*, 2 Cox, Ch. 386; *Edgell v. Haywood*, 3 Atk. 357;

*Burroughs v. Elton*, 11 Ves. 33. These decisions have since been followed, both in England and in this country, particularly upon bills by judgment creditors to set aside fraudulent conveyances. Thus it was held in *Hendricks v. Robinson*, 2 Johns. Ch. 283, that one creditor might maintain a bill on behalf of himself and other creditors, or on behalf of himself alone, to have certain conveyances of his debtor declared fraudulent and void; and in *Cuyler v. Moreland*, 6 Paige, 273, that a bill will be sustained filed by a judgment creditor for the double purpose of removing a fraudulent obstruction to an execution at law and of reaching the debtor's equitable assets; and though a fraudulent assignor dies before judgment against him, a creditor's bill will lie to set aside a fraudulent conveyance made by him. *Frazer v. Western*, 1 Barb. Ch. 220. In *Wakeman v. Grover*, 4 Paige, 23, the bill of a judgment creditor to obtain satisfaction out of his debtor's equitable assets was sustained, as was also a bill filed by such a creditor for the enforcement of his judgment out of property which the debtor had fraudulently placed out of his reach. *Weed v. Pierce*, 9 Cow. 722.

It is, therefore, settled beyond question that originally the court of chancery, in the exercise of its equitable powers, had jurisdiction of creditors' bills brought for the purpose of setting aside fraudulent conveyances, or reaching equitable assets which the defendant had put in the hands of third parties; and the plaintiff in the suit at bar, having exhausted his remedy at law by the return of his execution, as appears from his bill, was in situation to ask the aid of equity to set aside the alleged fraudulent conveyance, if the facts should demonstrate that it was so, and to reach the equitable assets, if any, which had been put out of his reach by the defendant.

The supreme and district courts of this territory have, under the organic law, chancery, as well as common-law, jurisdiction (Organic Law, Comp. Laws, § 33); and hence this complaint in its present form may be maintained unless some other remedy equally effectual has been provided by law. It is claimed that such remedy has been provided by the Code of Civil Procedure in its provisions in regard to proceedings supplementary to execution, and that this remedy is exclusive. We are unable to assent to this

proposition for several reasons. The remedy afforded by proceedings supplementary to execution is not as effective as that furnished by creditors' bills as administered by courts of equity. They are merely proceedings in the original action for the purpose of enforcing the judgment already recovered. *Dresser v. Van Pelt*, 15 How. Pr. 19; *Gold v. Torrance*, 19 id. 560. In the latter case the court, in defining these proceedings, says that they are in the nature of additional or equitable executions. It is not in any sense a new suit. By these proceedings a summary mode is instituted for ascertaining what, if any, property a judgment creditor may have under his control or in his possession subject to execution, and if any persons are owing him, and to what extent. Third persons cannot be made parties to the original suit, though they be compelled to appear and be examined as to any property under their control or in their custody belonging to the defendant, or as to whether they owe him. But this is the extent to which the inquiry can go in such proceedings. If property belonging to the defendant is found upon such an examination in the hands of these persons, it may be ordered turned over to apply on the judgment debt; but if the right of the person having it under apparent title comes in question, if he claims to be the owner of the property, the question of title cannot be summarily disposed of by the court or judge before whom the proceedings may be pending. Such questions must be adjudicated and determined by an action brought for that purpose. It is thus made apparent that the remedy by proceedings supplementary to execution are much less efficacious, and in many cases would not afford relief to the same extent as a bill in equity, and this even though the proceeding should be prosecuted to a receivership and carried to its utmost extent under the statute.

In *Field v. Sands*, 8 Bosw. 685, it was held that the commencement of supplementary proceedings and the appointment of a receiver therein did not create any lien upon assets previously assigned by the debtor; that such assets could only be reached by a creditor's suit. A similar decision was made in *Conger v. Sands*, 19 How. Pr. 8. See, also, *Gaspar v. Bennett*, 12 id. 307. It is doubtless true that in many jurisdictions adequate remedies have been provided by law to accomplish some of the purposes of

creditors' suits — discovery of assets, debts owing by third persons, and the like — and for these purposes proceedings supplementary to execution may be considered a substitute. But for the purpose of reaching equitable assets of the judgment debtor, or to set aside fraudulent transfers of property, supplemental proceedings provide an inadequate remedy ; and, though in many respects they may serve as a substitute for a creditor's bill, they are by no means the exclusive remedy to which the creditor may resort. He may still have his creditor's suit. *Pope v. Cole*, 64 Barb. 406 ; *Bank v. White*, 6 N. Y. 236.

The right of a judgment creditor to maintain an action in the nature of a creditor's bill, notwithstanding the remedy provided by proceedings supplementary to execution, has been frequently held. Thus, in *Catlin v. Doughty*, 12 How. Pr. 457, it was held that the former action by judgment creditor's bill was still in force, and might be resorted to by a judgment creditor to reach equitable assets after the return of an unsatisfied execution. In *Gere v. Dibble*, 17 How. Pr. 31, it was held that a creditor's bill would lie in favor of judgment creditors on their own account to set aside a fraudulent conveyance made by the judgment debtor on his real estate, even after the appointment of a receiver in proceedings supplementary to execution, the judgment constituting the basis of the action having been recovered before the receiver was appointed. In *Bennett v. McGuire*, 58 Barb. 625, it was held that a judgment creditor, even after having commenced proceedings supplementary to execution, had a right to abandon the same and maintain an action in his own name to set aside a mortgage executed by a judgment debtor as being without consideration, and fraudulent. The following cases will be found, also, to sustain this petition : *Bartlett v. Drew*, 4 Lans. 444 ; *Phelps v. Platt*, 50 Barb. 430 ; *Taft v. Wright*, 47 How. Pr. 1 ; *Burt v. Hoettinger*, 28 Ind. 217 ; *Parsons v. Meyburg*, 1 Duv. 206 ; and there are others of like import. We cannot assume that the legislature intended to take from creditors any of the remedies that they enjoyed under the court of chancery for the enforcement of their judgment, after having exhausted their remedy at law, and turn them over to the often inadequate and imperfect remedy provided by the statute in regard to proceed-

ings supplementary to execution. Upon reason and authority the remedy by creditor's suit exists now as it formerly did under the court of chancery. Under the Codes of Procedure a suit in the nature of a creditor's bill may be maintained under the same rules which formerly prevailed in courts of chancery. The Code has changed the form of the suit, but has not affected the rights of the parties, or impaired the powers of courts having equity jurisdiction from administering proper relief in a case showing a state of facts which formerly were sufficient to authorize a court of chancery to act. *Bartlett v. Drew*, 60 Barb. 648, affirmed, 57 N. Y. 587. The case of *Graham v. Railway Co.*, 10 Wis. 459, would seem to support the proposition that the proceeding supplementary to execution provided by the statutes of that state superseded the remedy by creditor's bills, and was exclusive. That case, however, has not been followed by the courts of that state. The decision of the case in which the rule there laid down was invoked was put upon other grounds, and the remedy by creditor's bills has been restored long since in that jurisdiction by legislative enactment. *Seymour v. Briggs*, 11 Wis. 196; *Gates v. Boomer*, 17 id. 455. The cases cited by the respondent from the California reports do not sustain his contention. In that state creditors' bills have always been maintainable. *Baker v. Bartol*, 6 Cal. 483; *Marshall v. Buchanan*, 35 id. 264. Such is also the rule in Colorado. *Allen v. Tritch*, 5 Colo. 222; *Frazer v. Smelting Co.*, 5 Fed. Rep. 163. And also in Kansas. *Ludes v. Hood*, 29 Kan. 49.

The complaint in the case at bar contains all the allegations necessary under the Code, or which were formerly required by the courts having equity jurisdiction in creditors' suits brought to set aside fraudulent conveyances as obstructions to an execution at law, and is sufficient.

The demurrer, therefore, must be overruled, and the *pro forma* judgment of the district court reversed, with leave to the defendants to answer within thirty days, on payment of costs and disbursements. All the justices concurring.

Demurrer overruled, judgment reversed, and defendants have leave to answer within thirty days on payment of costs, in default of which the district court is directed to take the proofs, or direct



the same to be taken by a referee, and grant such relief as may be proper.

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BROWN, Respondent, v. FORBES ET AL., Appellants.

**Pleading — Payment, When Unnecessary to Plead.**

Where in an action for the balance of an account it is alleged "no part thereof has been paid except" certain specified payments, the defendant, under a general denial, will be permitted to prove other payments than those stated in the complaint.

(Argued October 11, 1888; reversed October 13; opinion filed June 3, 1889.)

**A** PPEAL from district court, Lawrence county; Hon. C. M. THOMAS, Judge.

The action was brought to recover a balance alleged to be due plaintiff from defendant, for work, labor and services performed, after deducting sundry payments admitted by the complaint and alleged to have been the only payments made. Defense, general denial. On the trial the court excluded proof of other payments offered on behalf of defendant, to which ruling defendant excepted. Plaintiff had judgment and defendant appealed.

*Granville G. Bennett*, for appellants.

The court erred in excluding evidence of payment. Abbott, Trial Ev. 799; Bank v. Sherman, 33 N. Y. 69; Moorhouse v. Northrop, 33 Conn. 380; 2 Abbott, Forms, p. 48, n.; 2 Gr. Ev., §§ 516-526; Pomeroy, § 701; Hart v. Crawford, 41 Ind. 197; Wolcott v. Ensign, 53 id. 70.

*Martin & Mason*, for respondent, cited Bank v. Stover, 60 Cal. 390; Coles v. Soulsby, 21 id. 47; Sinard v. Patterson, 3 Black. 354; Ulsch v. Muller, 9 N. E. Rep. 736; Able v. Lee, 6 Tex. 427; Ward v. Winn, 42 Ga. 323; C. C. Pro., §§ 111, 118; C. C., §§ 832, 859, 2098, 2129; 2 Dan'l, Neg. Inst., § 1245.

SPENCER, J. (*After stating the above facts.*) The question involved in this appeal is whether or not the pleadings were sufficient to authorize the defendant to prove other payments than those set forth by the complaint. The plaintiff in his complaint alleges, in substance, that during the years 1883, 1884 and 1885

he performed for the defendant, and at his special instance and request, certain work, labor and services, in all, eighteen months' labor, which was reasonably worth, and for which the defendant agreed to pay \$50 per month; *that no part thereof has been paid except the sums of \$181.75, \$99.75 and \$53, in all the sum of \$334.50, and that there is now due and owing from the defendant to this plaintiff the sum of \$565.50, and interest from March 25, 1885.*

To this complaint the defendant answered, denying each and every allegation therein contained. Upon the trial he offered to prove other payments than those admitted by the complaint. Such proof was excluded on objection that the payment was not alleged in the answer. The averment of the complaint that only certain sums had been paid, and that there was still due and owing a certain sum with interest from a specified date, and the denial made by the answer of all the allegations therein contained, formed an issue as to all the averments set forth in the complaint and denied by the answer, not only as to the time the plaintiff was employed and performed services for the defendant, but necessarily as to the amount of the several payments made. The question as to the different payments which ought to have been credited to the defendant was necessarily involved in the issue thus formed, and in order to determine what sum was in fact due the plaintiff, which was the material question in the case, it was as essential to ascertain what payments had been made as it was to determine when the service commenced, and during what period it continued. The balance due the plaintiff, if any, could not be ascertained or determined except by inquiry and investigation as to the time the plaintiff worked for the defendant, the value of the services performed, and the amount of the payments that had been made on account thereon. The plaintiff sued for a balance alleged to be due him, averring that certain payments (which he specified particularly), and no others, had been made. This allegation invited an issue as to whether any other payments had been made or not, and what the balance remaining unpaid was, if any thing. The general denial of the defendant put that allegation in issue. Had the plaintiff sued on his contract, alleged performance of it, and demanded judgment, as he might

have done, it would have been incumbent on the defendant in his answer to have alleged payment in order to have permitted him to have proved such defense; but where a plaintiff sues for a balance, alleging that certain payments, *and no others*, have been made, he empowers the defendant by his general denial to have the state of the account investigated, the extent to which the original demand has been reduced by payments ascertained, and the amount of the balance determined. See *Quin v. Lloyd*, 41 N. Y. 349; *White v. Smith*, 46 id. 418; *Pom. Rem.* 740.

The district court, therefore, erred in excluding the evidence of payment offered in behalf of the defendant, and the judgment must be reversed.

Judgment reversed, and new trial ordered; all the justices concurring, except THOMAS, J., not sitting.

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FIRST NATIONAL BANK, Respondent, v. HONEYMAN ET AL.,  
Appellants.

**Mortgage — Rights of the Grantee of the Equity.**

In an action to foreclose by the assignee of a mortgage to secure future advances, an owner of the equity of redemption will be permitted to impeach a settlement as to the amount due, made by the parties to the mortgage after the conveyance of the equity.

(Argued Feb. 18, 1888; reversed Feb. 24, 1888; opinion filed June 8, 1889.)

**A** PPEAL from the district court, Cass county; Hon. W. B. McCONNELL, Judge.

The action was to foreclose a mortgage given to secure future advances, and was brought by an assignee. Before the assignment to the plaintiff an agreement as to the amount which had been advanced on the security of the mortgage was made between the mortgagor and mortgagee and was evidenced by the notes of the former for the amount. Prior to this agreement, however, the mortgagor had conveyed the premises to these defendants. Defense, that a less sum was in fact advanced than was evidenced by such agreement. Evidence to establish this defense was excluded on the trial, and such ruling is the principal ground of

error assigned. The plaintiff had judgment and the defendants, mortgagors' grantees, appealed.

*D. H. Twaney, R. M. Pollock and S. B. Bartlett*, for appellants.

The only question is, what is the land liable for under the mortgage? The court found that the last advancement was December 20, 1878. It also found that on the 31st of December, 1878, Ebenezer Honeyman transferred all his right, title and interest in the mortgaged premises to John Honeyman. If Forrest, the mortgagee, had brought the action the amount of his lien against the land would be the sum advanced up to December 20, 1878, and the burden of showing this would have been on him. *Fisher v. Ottis*, 3 Pinney, 91; *Jones, Chat. Mort.*, § 94. The burden was also on Forrest's assignee. *Fisher v. Ottis, supra*; see, also, 1 *Jones, Mort.*, § 378; *Kline v. McGuckin*, 25 N. J. Eq. 433.

As soon as Ebenezer parted with his title his grantee succeeded to his rights. *Wood v. Goodfellow*, 43 Cal. 189; *Campbell v. Hall*, 16 N. Y. 579. The mortgagor after the 31st of December, 1878, had no power to create any charge upon the land. *Lord v. Morris*, 18 Cal. 491; *Barber v. Bable*, 36 id. 20; *Wood v. Goodfellow*, 43 id. 188; *McGready v. McGready*, 17 Mo. 597; *Wilson v. Simpson*, 4 So. Rep. 843; *Vrooman v. King*, 36 N. Y. 482; *Addler v. Apt*, 14 N. W. Rep. 63; *Ferris v. Boxwell*, 25 id. 592; *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 642; *Padgett v. Lawrence*, 10 Paige, 170, 40 Am. Dec. 233; *Lent v. Shear*, 26 Cal. 370.

Appellants were not, therefore, bound by the settlement of the parties made August 12, 1879, and the court erred in rejecting the evidence impeaching it.

*Chas. A. Pollock*, for respondent.

Appellants all claim under Ebenezer Honeyman and had full knowledge of his mortgage to Forrest. It will doubtless be conceded that the grantees of John Honeyman (who got his title from Ebenezer) stand in the same relation to the Forrest mortgage as John himself did at the time the title passed from him; and that the respondent occupies at least as good a position to the transaction as Forrest did when he assigned his mortgage to it. *Cent. N. Bank v. N. B. Com.*, 50 N. Y. 580; 1 *Jones, Mort.* 841; 2 id. 1202.

From the foregoing, respondent claims :

1. *That without actual notice to Forrest of junior interests in the property John Honeyman is bound by the accounting and settlement between Ebenezer and Forrest to the same extent that Ebenezer is.* Tiedman, Real Prop., § 340 ; Stuyvesant v. Hall, 2 Barb. Ch. 158 ; Blair v. Ward, 10 N. J. Eq. 126 ; Guion v. Knapp, 6 Paige, 43.

II. That John, by his laches and inexcusable silence, is estopped from claiming title to the property at the time of the settlement. Bigelow, Estoppel, 434, 437, 452, 453 ; Pickard v. Sears, 6 Ad. & E. 469 ; Phillip, Ev. 464 ; 2 Pomeroy, Eq., §§ 264, 499, 500, 806 ; Dazill v. Odel, 3 Hill, 219 ; Smith, Lead. Cas. 562.

III. John and his grantees stand in the same relation to Forrest as Ebenezer does. Lockwood v. Thorn, 18 N. Y. 292 ; Martin v. Beckwith, 4 Wis. 219 ; Marsh v. Cass, 30 id. 531 ; Hoyt v. McLaughlin, 52 id. 280 ; Stevens v. Co. of Saginaw, 29 N. W. Rep. 492 ; Hurley v. Eleventh Ward Bk., 76 N. Y. 618.

IV. Collusion, fraud and mistake can only be proven upon definite and specific allegations, made by the party desiring to introduce evidence for that purpose. Slee v. Bloom, 20 Johns. 669 ; Baker v. Hoff, 52 How. Pr. 382 ; Weed v. Small, 8 Paige, 575 ; Kilpatrick v. Henson, 1 S. Rep. 189.

SPENCER, J. (*After stating the above facts.*) This action was brought to foreclose a mortgage executed on the 9th day of November, 1878, by Ebenezer Honeyman to one George Forrest, on certain premises in Cass county described in the complaint. The object and purpose of the mortgage was to secure the payment of certain sums of money which said Forrest had advanced to and for said mortgagor, and also such further sums as he should advance to and for him, from time to time, in the future. It was provided by said mortgage that the same should be void on the payment by the said Honeyman of all sums of money already advanced to and for him by said Forrest, and on payment, also, of all promissory notes and bills of exchange made by the said mortgagor to said Forrest, or indorsed or accepted by him, and of all sums of money, and the interest thereon, at the rate of 7% per an-

num, which might be advanced in the future by said Forrest to or for or on account of said mortgagor ; and that on default in the payment of any of the moneys so advanced and secured by the said mortgage the whole amount thereof should become due and payable, and said mortgage might be foreclosed, and said premises sold for the payment thereof. Certain sums of money had been advanced by Forrest to the said Ebenezer Honeyman, and for him at the time and previous to the execution of said mortgage ; and subsequently thereto there was advanced by said Forrest to and for said Honeyman, and upon his account from time to time, certain sums of money for which this mortgage was considered as security for the payment. On the 12th day of August, 1879, said Forrest and Honeyman, the mortgagor, had an accounting and settlement of their affairs, and concluded an agreement between themselves that the sum of money so advanced by said Forrest to and for said Honeyman was \$3,782, and that said mortgage should be security for that sum, with interest at the rate of 10% per annum from that date. As evidence of this settlement and agreement, the said Honeyman at that time executed and delivered to said Forrest his seven promissory notes, bearing date on that day for different amounts, but aggregating said sum of \$3,782, payable in from one to twelve months, with interest as aforesaid. No money was advanced by said Forrest on the security of said mortgage, subsequently to that date. On the 9th day of August, 1883, said mortgage, and the debt secured thereby, was by said Forrest duly assigned and delivered to the plaintiff in this action. Default having occurred in the payment of the moneys thereby secured, this action was brought for a foreclosure of said mortgage, and a sale of the premises ; the amount claimed to be due being the sum as fixed by said agreement and notes. It is admitted, or, at least, undisputed, that no part of the sum so agreed upon or interest has been paid.

The defendants May Honeyman and John Reed each answered the complaint in said action separately, and for defense to said action alleged, among other things, that said Ebenezer Honeyman, the mortgagor, had, prior to the settlement and agreement between him and said Forrest, and the execution of said notes, and prior to the assignment of said mortgage to the plaintiff, to-wit,

on December 31, 1878, conveyed, for a valuable consideration, all of the premises described in said mortgage to one John Honeyman, and that they were each owners of separate parcels of said mortgaged premises; and they each further alleged that said Forrest had not in fact advanced any money to or for or on account of said Ebenezer Honeyman for which said mortgage was security, and denied that the amount as fixed by said agreement and alleged in the complaint to be due on said mortgage was due in fact. Upon the trial of the action the district court found as a fact, and it is undisputed, that said Ebenezer Honeyman, the mortgagor, transferred and conveyed all his interest and title in and to the mortgaged premises to John Honeyman by warranty deed dated December 31, 1878, which deed, however, was not recorded in the proper register's office until August 13, 1879; it having been executed before the settlement between Ebenezer Honeyman and said Forrest, but not recorded until after the assignment of said mortgage to said plaintiff. The defendants May Honeyman and John Reed also on said trial offered to prove that said Forrest had not in fact made the payments and advances as agreed upon in the settlement between him and said Ebenezer Honeyman, and as evidenced by said notes, and that consequently a less sum was due on said mortgage than evidenced by such agreement and claimed in the complaint. To this proof the plaintiff objected, upon the grounds substantially, that it was immaterial, irrelevant, and incompetent, for the reason that it sought to open the accounting and impeach the settlement made between the mortgagor and mortgagee; and that the defendants, and all persons claiming under said Ebenezer Honeyman, were bound and estopped by such settlement. This objection was sustained by the court, and to such ruling the defendants duly excepted. The plaintiff had judgment as prayed for in the complaint, and that there was due on said mortgage \$3,782 and interest; and the defendants May Honeyman and John Reed appealed to this court, assigning several grounds of error, and, among others, the ruling of the court above mentioned, which presents the only question we deem it necessary to examine, namely, whether the plaintiff, the assignee of said mortgage, took it subject to the right of the owners of the equity of redemption of the mortgaged premises to



impeach the agreement made between the mortgagor and mortgagee as to the amount secured by the mortgage; in other words, whether grantees of a mortgagor may, as against the assignee of the mortgage, impeach an agreement and settlement made by the mortgagor and mortgagee as to the amount due on a mortgage given to secure future advances, such agreement having been made subsequent to the grant of the equity of redemption.

That the assignee of a mortgage takes it subject to all the equities existing between the mortgagor and mortgagee has long been a well-settled proposition, and is a familiar principle of law. *Clute v. Robinson*, 2 Johns. 595; *Ellis v. Messervie*, 11 Paige, 467. The plaintiff in this action, therefore, took the mortgage subject to any defense, legal or equitable, which the original mortgagor could have made to it had he continued to own the mortgaged premises. Could the mortgagor have controverted in this action the amount due on the mortgage? We think this question must be answered in the affirmative, and this notwithstanding the settlement and agreement made between him and the mortgagee as to the amount that had been advanced upon the security of the mortgage. As between the parties themselves, this agreement and settlement, and the giving of the notes in pursuance of it, were not, and could not have been, absolutely conclusive, so as to have deprived the mortgagor of the right to have litigated the question of the amount secured, if he had so desired, as against the mortgagee. While, as between them, the notes which were given in pursuance of the agreement were *prima facie* evidence of the amount advanced by Forrest, and for the payment of which the mortgage was security, neither party was concluded by it. On the contrary, under proper pleadings, it would have been competent for either party to the mortgage or the assignee of the mortgage debt to show that the sum actually advanced was either more or less than the amount stated in the notes, and the amount for which the mortgage stood as security would have been increased or diminished according as it would have been determined whether the amount advanced was greater or less than the sum originally agreed upon. The accounting and agreement between the mortgagor and mortgagee, as to the amount which had been advanced as between them, had the effect

of an account stated, and nothing more; and upon the trial of the cause the mortgagor (being personally liable for the payment of any deficiency in the event that upon the foreclosure sale the premises should sell for a sum less than was due on the mortgage) had the right, under proper averments in his answer, to show that a mistake had been made in the agreement between him and Forrest, and that the sum actually advanced was in fact less than the sum agreed upon and for which the notes were given.

The rule which governs accounts settled, in regard to their impeachment, is thus stated, by Mr. Justice SELDEN in *Lockwood v. Thorne*, 18 N. Y. 292: "An account stated or settled is a mere admission that the account is correct. It is not an estoppel. The account is still open to impeachment for mistakes or errors. Its effect is to establish, *prima facie*, the accuracy of the items, without other proof, and the party seeking to impeach it is bound to show affirmatively the mistake or error alleged. The force of the admission, and the strength of the evidence which will be necessary to overcome it, will depend upon the circumstances of the case. An account stated, which is shown to have been examined by both parties, and expressly assented to or assigned by them, would afford stronger evidence of the correctness of its items than if it merely appeared that it had been delivered to the party, or sent by mail, and acquiesced in for a sufficient length of time to entitle it to be considered as an account stated. So, too, an account settled — that is, when the balance it exhibits has been paid or adjusted between the parties — is stronger evidence, and requires more proof to overcome it, than a mere account stated. But the parties are never precluded from giving evidence to impeach the account, unless the case is brought within the principles of an estoppel *in pais*, or of an obligatory agreement between the parties; as, for instance, where, upon a settlement, mutual compromises are made." The rule as thus aptly stated is undoubtedly correct, and is sanctioned by the highest authority in this country and England.

Applying this principle to the case at bar, it will be readily perceived and is indisputable that Ebenezer Honeyman, the mortgagor, was entitled, had he so desired, upon the trial of this action, to have shown that a less sum was in fact advanced upon the se-

curity of the mortgage than appeared from the notes, even as against the plaintiff, the mortgage not having been assigned to said plaintiff until after the maturity of all of said notes; and, even if they had, it is probable that the mortgage itself would have furnished such notice to its assignee as not to have precluded proof of the amount actually advanced upon its security. But that is a question not necessary to be considered here.

The assignee of a mortgage takes it, also, subject to the equities of a grantee, mediate or remote, of the mortgagor, as against the mortgagee or his assigns, if such grantee be in possession. Such an assignee stands in the place of the person from whom he purchased the mortgage, as was said by Lord THURLOW in *Davies v. Austen*, 1 Ves. Jr. 247: "A purchaser of a chose in action must always abide by the case of the person from whom he buys; that I take to be a universal rule." In *Coles v. Jones*, 2 Vern. 692, it was held by Lord HARCOURT that, although the assignee comes in upon a full and valuable consideration, yet he must take the land subject to the same equity as it was in the obligee's hands. It is very clear that when a mortgage is assigned without privity of the mortgagor the assignee takes it subject to the equities between the mortgagor and mortgagee. A similar decision was made in *Matthews v. Wallwyn*, 4 Ves. 118. See, also, *Davis v. Bechstein*, 69 N. Y. 440; *Andrews v. Torrey*, 14 N. J. Eq. 355. And such an assignee takes the mortgage subject, not only to any latent equities which exist in favor of the mortgagor, but also to like equities in favor of other persons. *Bush v. Lathrop*, 22 N. Y. 535; *Schafer v. Reilly*, 50 id. 61.

In this discussion it will be borne in mind that under the law of this territory mortgages are mere liens upon the land covered by them, the mortgagor in both law and equity being regarded as the owner of the fee, and the mortgage a mere chose in action — a security of a personal nature. Comp. Laws, § 4346.

From what has been said, and from the authorities cited, it will be perceived that the plaintiff took the mortgage in suit subject to all the equities which existed in favor of the mortgagor or of his grantees, directly or indirectly, and that neither of them were concluded by the agreement proved, and the execution and delivery of the notes; that the grantee could avail himself of any de-

fense which the mortgagor could employ. But though the mortgagor had, after his conveyance to these appellants or their grantors, by his act estopped himself from controverting the amount secured by the mortgage, it would not have precluded the owner of the premises from proving the true amount advanced, and for which the mortgage was in fact security, unless they or their grantors were parties to such act, or knew of it, which it is not pretended they did in this case.

The mortgagor having conveyed the mortgaged premises before any agreement was made between him and the mortgagee as to the amount which had been advanced, his grantee of the premises is subject to the payment of only such sum of money as had in fact been advanced upon that security, and it was not competent for the mortgagor and mortgagee to afterward enter into any agreement or contract by which such sum should be increased, and the rights of the owners of the premises impaired.

The owner of mortgaged premises, under a title from the mortgagor, either immediately or remotely, is substituted for him to a great extent, and succeeds to his rights. The mortgage is a lien upon his property, and if the debt secured by it be not paid, the premises covered by it become the primary fund for the payment of such portion of the debt as may remain unpaid, and hence he is the person most usually interested in the amount of the incumbrance. After the conveyance of the title to the mortgaged premises by the mortgagor to John Honeyman, the appellants' grantor, the former was powerless to do any act or make any agreement which would increase the amount of the obligation secured by the mortgage, or to bind his grantee, or those who should succeed to his title, by one or a series of conveyances, by any agreement he might make with the mortgagee or his assigns without their knowledge or consent. *President, etc., v. Roosevelt*, 9 Cow. 409; *Hartley v. Tatham*, 2 Abb. Dec. 333. It is not pretended that either of these defendants knew of such agreement, or consented to it. The agreement, therefore, of the mortgagor and mortgagee, as to the amount which had been advanced upon the security of the mortgage, was as to these defendants wholly without force, and of no binding effect whatever. The evidence offered by the defendants for the purpose of showing that a less

sum had in fact been advanced on the mortgage was, therefore, competent, material, and proper, and the ruling of the court in excluding such testimony was erroneous, and prejudiced the defendants' rights. For these reasons the judgment appealed from must be reversed, and a new trial ordered. All the justices concurring.

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THOMPSON, Respondent, *v.* SCHAETZEL, Appellant.

1. Trover and Conversion — Measure of Damages — Trial — Instructions.

The measure of damages for the conversion of personal property by § 4603, C. L., is the value of the property at the date of the conversion with interest thereon, or, where the action is prosecuted with reasonable diligence, the highest market value at any time between the conversion and verdict at the option of the injured party. The plaintiff in his complaint demanded judgment for the value at the date of the conversion with interest. The court over objection admitted proof of value intermediate the conversion and verdict; but in its charge to the jury limited the damages to the value at the date of the conversion with interest. There was no sufficient evidence of the value of the property at the date of the conversion to support the verdict; *held*, the judgment must be reversed.

2. Same — Election of Measure of Damages.

The question of the plaintiff's election of the measure of damages he will rely upon under this statute considered, but not determined.

(Argued February 12, 1889; reversed and opinion filed June 8, 1889.)

**A** PPEAL from the district court, Minnehaha county; Hon. JAMES SPENCER, Judge.

*C. O. Bailey* and *H. H. Keith*, for appellant.

At common law in actions of trover the measure of damages was the value of the property at the time of the conversion with the interest up to the time of the judgment. *Shepard v. Pratt*, 16 Kan. 209; *Burney v. Phelps*, 3 Rich. (S. C.) 191; *Curtis v. Ward*, 20 Conn. 204; *Rayburn v. Pryor*, 14 Ark. 505; *Funk v. Dillon*, 21 Mo. 294; *Nesbitt v. St. Paul Lumber Co.*, 21 Minn. 491; *Walker v. Bosland*, 21 Mo. 289; *Finch v. Blount*, 7 C. & P. 478; *Mercer v. Jones*, 3 Camp. 477; *Amswath v. Bowen*, 9 Wis. 348; *Hurd v. Hubbell*, 26 Conn. 389; *Backenstoss v. Stahler*, 33 Pa. St. 251; 6 Wait's Act. & Def. p. 222, § 9.

As respondent elected, by his complaint, to take the common-law measure, in preference to the option given by the Code, he must be held to prove the value of the stock on the date of the alleged conversion. Any evidence tending to prove any other measure was inadmissible. *Waterson v. Seat*, 10 Fla. 326; *Palmer Co. v. Ferrill*, 17 Pick. 58; *McLaren v. Birdsong*, 24 Ga. 359; *Green v. City of Fall River*, 113 Mass. 262; *Chandler v. Jamaica Pond Co.*, 122 id. 305.

The verdict was against the weight of evidence.

*T. B. McMartin*, for respondent.

Damages in conversion under our Code are not measured by the demand in the complaint. The right of the highest market value is predicated upon diligence in prosecuting the action. Hence, the complaint may pray for one relief, and plaintiff be entitled in the language of the statute to this optional measure up to the time of verdict. Suppose the stock sued for were of fluctuating value, from week to week, during the pendency of the cause, under their claim, plaintiff would have had to ask leave to amend his complaint so far as the prayer was concerned. Suppose the court had refused as many applications, would it have deprived him from claiming the "highest market value up to the time of verdict?" The answer is plain.

The question of value was properly submitted to the jury and there was abundance of evidence to sustain the finding on that point.

TRIPP, C. J. This is an action in the nature of trover brought against the defendant to recover for the alleged conversion of 150 shares of stock of the Sioux Falls Brewing Company. The complaint, after setting out the incorporation of plaintiff and the subsequent appointment of the receiver, alleges that "among the assets of the bank were three promissory notes executed by George A. Knott to the bank — two for five thousand dollars each, and one for four thousand one hundred and fifty dollars and seventy-nine cents — all dated September 15, 1885, bearing interest from date at ten per cent, payable on demand; that, for security for the payment of said notes, said Knott pledged with the First National

Bank one hundred and fifty certificates of shares of stock of the Sioux Falls Brewing Company of the value of twenty-five thousand dollars; that said certificates of stock, of the value as aforesaid, came into the possession of the defendant, Jacob Schaetzel, Jr.; that on April 8, 1886, the plaintiff caused demand to be made of defendant for the possession of said certificates of stock; and that defendant refuses to deliver possession, and converted the same into his own use to the damage of plaintiff"—and demands judgment "for \$25,000, and interest thereon from April 8, 1886, and costs."

The answer admits the incorporation of the plaintiff bank, and the appointment and qualification of the receiver, but denies the other allegations of the complaint.

The defendant also alleges, in substance, that he received only 100 shares of the stock described in the complaint, and that they were received by him from the plaintiff bank as security for services rendered by him for the bank, for which no amount has been paid or tendered him; and he further alleges that he transferred said shares to one Moriz Levinger under and by virtue of a contract made by said Levinger with said bank, and for which the said Levinger paid the said bank, no part of which said amount has been repaid said Levinger, but that said contracts, etc., have been recognized and ratified by said receiver.

It will be observed that the plaintiff, in its prayer for relief, demands "judgment for \$25,000, with interest from the 8th day of April, 1886," the day of the alleged conversion. Under our statute giving damages for conversion of personal property, "the detriment caused by the wrongful conversion of personal property is presumed to be (1) the value of the property at the time of the conversion, with the interest from that time; or, (2) where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party," etc. § 4603, Comp. Laws. And the defendant contended at the trial that, plaintiff having demanded, in the prayer of the complaint, the value of the property on the day of the alleged conversion, with interest therefrom, he had exercised his option under the statute, and could not be permitted to give in evi-



dence the value of the property intermediate the alleged conversion and the verdict ; but the court admitted such evidence over the defendant's objection, and subsequently rejected defendant's offer to prove the value of the property on the day of the alleged conversion, to which rulings of the court the defendant duly excepted. Subsequently, in his charge to the jury, the judge expressly limited them in their assessment of damages to the value of the property on the day of the alleged conversion, with interest to the time of the verdict. The court evidently, upon a review of the whole case, when he came to charge the jury, concluded to treat the prayer of the complaint as an exercise of plaintiff's option as to the measure of damage given by the statute. The statute is a peculiar one, and was evidently taken from California, where it was adopted in the Revision of 1873. It was evidently intended to settle the conflict of authority as to the measure of damages in conversion of personal property. The English rule seems to have been to leave the measure of damage to the discretion of the jury, except in case of stocks, in which the time of the trial was fixed as the date of value. In America, however, the universal rule seems to have been for the courts to establish the measure of damages as a question of law ; and, while the great weight of authority seems to be in favor of the rule as it existed in this territory prior to the amendment of 1885, to-wit, the value of the property at the time of conversion, with interest to the time of verdict, yet a number of states — notably New York, California, Pennsylvania and Iowa — in case of stocks, early adopted the rule substantially as laid down by our Amendment of 1885. Nearly all of these states, however, have either abrogated the rule or so far modified it as to allow the highest intermediate value between the time of the conversion and a reasonable time after the owner has received notice to enable him to replace the stock ; and a very late decision of the supreme court of the United States, in case of stocks, upon a review of the cases, adopts this as the latter and better rule. *Gallagher v. Jones*, 9 Sup. Ct. Rep. 335. California, however, after a modification of the rule by her courts, has again by statute returned to substantially the rule originally adopted in that state, giving, however, to the party injured the option as to which measure or rule of damages he will adopt ; and we have enacted

the California rule. One other state — Georgia — seems to have adopted a similar rule. Georgia Code, 1873, § 3077.

Whether the rule laid down by the statute is the better rule, or the one announced by the supreme court of the United States, in absence of statute, it is not our province here to inquire. It is sufficient that the legislature has seen fit to settle the conflict, and the only question for the court is to construe the statute as adopted. The statute has given to the defendant the option of claiming the value at the date of the conversion, with interest, or the highest market value intermediate the conversion and the verdict, without interest, but it nowhere prescribes how or when he shall exercise such option. California has held, under this statute, that when he fails to exercise such option the court may exercise it for him. *Barrante v. Garratt*, 50 Cal. 114. And the same court has also held that the question of "reasonable diligence" with which the action shall be prosecuted is a question of law for the court, upon an admitted state of facts. *Fromm v. Mining Co.*, 61 Cal. 629. But I am unable to find that the court has passed upon the question whether the plaintiff can be compelled to exercise his option prior to the trial, or at any time, or where he has exercised such option, that it is final, or what shall be construed as an exercise of such option. The question is one not free from difficulty. The defendant contends that he is entitled to an election on the plaintiff's part to prepare his (defendant's) case for trial; that the evidence may be entirely different, and he may require different witnesses in proving the different values under the option allowed the plaintiff; and that, in any event, after plaintiff has made his election, he should not be permitted to change it on the trial; and he further contends that, by demanding the value on the date of the alleged conversion, with interest, he has as plainly and certainly exercised his option as though he had so expressly declared it; and that the prayer of the complaint is the proper, if not the only, place where the defendant ought to be required to look for the remedy, and the extent of the remedy, that the plaintiff deems himself entitled to. On the other hand, the plaintiff claims that he is bound by the remedy claimed or judgment demanded in case of default only; and that, in case of defendant's appearance, and upon trial of the issues, he has a right to any remedy which he

may be found entitled to upon the evidence. The record is a long one. These and numerous questions were pressed upon the attention of the court at the trial, which, in the view we have taken of the case, we do not deem it necessary or proper to determine; and as the case must be reversed upon the ground that, upon examination of the entire record, there is no evidence of the value of the property on the day of the alleged conversion sufficient to sustain the verdict — that being the date to which the court confined the inquiry of the jury, and which instruction they are presumed to have followed — we have concluded to allow the entire case to be retried, leaving the lower court free, upon a new presentation of such questions, should they again arise, to pass upon them uncontrolled by the action of this court. All the justices concur. SPENCER, J., not sitting.

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OSWALD ET AL., Appellants, v. MCCAULEY ET AL., Respondents.

**Homestead, Character of Estate to Constitute.**

There being no qualification in the homestead act as to the character of the estate, a judgment debtor may claim a homestead in an undivided interest in land. The test is, if the interest is such that it could be sold on execution, it can be claimed as a homestead against a creditor.

(Argued February 7, 1889; affirmed February 19; opinion filed June 3, 1889.)

**A** PPEAL from the district court, Cass county; Hon. W. B. McCONNELL, Judge.

*Alf. E. Royesen (Thomas & Davis, of counsel), for appellants.*

A party claiming a homestead must be the owner of it. This position is strengthened by the definition of ownership found in the C. C., § 159. An undivided ownership is inconsistent with the homestead act and this definition. This view is in accord with the authorities. *West v. Ward*, 26 Wis. 579; *Wolf v. Fleischaker*, 5 Cal. 244; *Giblin v. Jordon*, 6 id. 416; *Elias v. Verdugo*, 37 id. 421; *Kingsley v. Kingsley*, 39 id. 67; *Thurston v. Maddocks*, 6 Allen, 427; *Bemis v. Driscoll*, 101 Mass. 420.

In the leading case holding the opposite doctrine (*Thorne v. Thorne*, 14 Ia. 54), the court mentions the California decisions,

but claims that the reason there given would not apply under their peculiar statute. The case of *Hewitt v. Ranken*, 41 Ia. 35, is based merely upon the former decision. It is not difficult to see the distinction between the language of our statute, which uses the language, "as hereinafter defined," limiting the homestead right to what is defined as a homestead in the statute, and that of Iowa providing, in effect, that the homestead, whatever its nature, shall be exempt, except where the statute excepts specifically.

The case of *Horn v. Tuffs*, 39 N. H. 478, and *McClary v. Bixby*, 36 Vt. 254, are as equally distinguishable from the case at bar.

It is evident from an examination of our statute that its provisions were copied from those of Iowa with the exception of the first section. But the Iowa statute has not the provisions of ours with reference to platting the homestead out by metes and bounds. In this respect ours agrees substantially with that of Wisconsin. Before the adoption of our law the opinion in the case of *Thorne v. Thorne* had been rendered, but the compilers left out the section on which the case was based, and adopted the provisions embodied in the Wisconsin act referring to the selection and platting of the homestead, which had at that time received an interpretation by the Wisconsin courts. Hence, under the rules of construction of statutes taken from other states, the case of *West v. Ward*, *supra*, ought to be followed.

*C. E. Joslin*, for respondents.

There might be force in the argument of appellants if the interest claimed exceeded that allowed by law, but the record shows that it was an estate less than could be lawfully held. The true test is, was it an interest that could be sold on execution? *Conklin v. Foster*, 57 Ill. 197; *Bartholomew v. West*, 2 Dill. 293; *Deere v. Chapman*, 25 Ill. 612; *Thomp.*, §§ 164, 165, 180, 181, 182; *Spencer v. Geissmen*, 37 Cal. 99; *Brooks v. Hyde*, *id.* 373; *Freeman, Ex.*, §§ 242, 243, 244; *Tarrant v. Swain*, 15 Kan. 149.

The contrary rule is founded on convenience merely. *Thompson*, § 183; *Thurston v. Maddocks*, 6 Allen, 430; *Bemis v. Driscoll*, 101 Mass. 321; 97 *id.* 392; *Wolf v. Fleischacker*, 5 Cal. 245; *West v. Ward*, 26 Wis. 580.

In Vermont and Iowa the force of the reason of these decisions

is denied. Thompson, §§ 186, 187, 188 ; McClary v. Bixby, 36 Vt. 254 ; Thorn v. Thorn, 14 Ia. 54 ; Hewitt v. Rankin, 41 id. 35.

Counsel are in error in their statement that the provisions of our statute in reference to platting the homestead is not contained in the Iowa statute. Also, that our provision on this subject is from Wisconsin. An examination will show that the act is from Iowa where it received a construction before its adoption here.

The early Wisconsin doctrine has been modified by statute. As to the early rule in California its court has admitted it to be harsh, but as it had become a rule of property the court refused to disturb it. An examination of the Massachusetts statutes will show those cases inapplicable.

CARLAND, J. The appellants, being judgment creditors of respondents, commenced an action in the district court of Cass county, for the purpose of subjecting the property hereinafter mentioned to the lien of their judgment. The respondents claimed the same as a homestead. The trial court found that respondent Frank B. McCauley owned an undivided half of lots 2 and 3 in block 2 of Keeny & Devitt's addition to the city of Fargo ; that respondent Benjamin P. Reynolds owned an undivided one-half of said lot 3, but had no interest in said lot 2 ; that McCauley had occupied with his family the second story of the buildings on lots 2 and 3 as a place of residence for more than three years, using the first floor thereof as a place of business ; that respondent Reynolds owned and occupied lot 4 in block 2 of said addition as a place of residence for himself and family, and occupied the ground floor of said lot 3 as a place of business, lot 3 being contiguous to lot 4 ; that Reynolds and wife had filed their certificate of homestead for lot 4, and the half interest in lot 3, as required by law ; that McCauley and wife had filed their certificate of homestead for their half interest in lots 2 and 3 ; that each of said lots was twenty-five by one hundred and forty feet, and that the whole of the three lots were less than one acre in extent. The trial court held the premises to be the homesteads, respectively, of Frank B. McCauley and Benjamin P. Reynolds, and not subject to the lien of the judgment of appellants.

It will thus be seen that the only question presented by the record is, can a homestead be claimed in this territory in an undivided interest in land? In determining this question it must be borne in mind that this is a contest between a creditor and the homestead claimant, and what we shall have to say must be considered as expressing our views in cases where the creditor is contesting the homestead right, rather than where a co-tenant or owner of the land is contesting it. On grounds of public policy the legislature, in order to preserve the integrity of the family from the disasters resulting from the varying fortunes of men, has withdrawn from the reach of the creditor the property of the debtor which is used by his family as a home. The legislature has in no wise prescribed that this right of homestead shall depend upon the character of the estate owned by the debtor or homestead claimant, and it seems to us that a court which will, in the face of the principles underlying the establishment of this right of homestead, seek to destroy it merely on the ground that in some instances it is difficult to carve out the homestead, will find its decision based upon difficulties more apparent than real.

We believe the true test to be that if the homestead, if not exempt, could be sold on execution, then it is property in which a homestead can be claimed as against a creditor. Take the case at bar. If these appellants should purchase at execution sale the interest of these respondents in the premises described, would they have any difficulty in obtaining partition? Still they say to these respondents: "You can claim no homestead in these premises, because you cannot carve out a homestead from them." We think that by virtue of section 14, chapter 38, of the Political Code, the court is authorized at all times to ascertain and define the homestead. In this case, however, the appellants are not in a position to urge the matter of difficulty in carving out the respondents' homesteads, as the premises are within a town plat, and do not exceed one acre in extent. We are aware that the decisions are not uniform on the question of whether a homestead can be claimed in an undivided interest in land — Vermont, Iowa, Texas, Kansas, New Hampshire and Arkansas holding in the affirmative, and Massachusetts, California, Minnesota, Wisconsin and Michigan in the negative. As the statute of this territory

has not limited the right of homestead to any particular estate in land, and as we believe the legislature intended to withdraw from the reach of the creditor the property used as a home by the debtor, we shall concur in the views expressed by Mr. Freeman in his work on Co-Tenancy and Partition, § 54: "But we see no sufficient reason, even in the absence of statutes bearing directly upon the subject, for holding that a general homestead act does not apply to lands held in co-tenancy. The fact that a homestead claim might savor of such an assumption of an exclusive right as is inconsistent with the rights of the other co-tenant, and that the maintenance of such claim might interfere with proceedings for partition, form no very satisfactory reason for denying the exemption. If the rights of the other co-tenant are threatened or endangered, he alone should be permitted to call for protection and redress. The law will not sanction any use of the homestead in prejudice of his rights. But as long as his interests are respected, or so nearly respected that he feels no inclination to complain, why should some person having no interest in the co-tenancy be allowed to avail himself of the law of co-tenancy for his own and not for a co-tenant's gain? The homestead laws have an object perfectly well understood, and in the promotion of which courts may well employ the most liberal and humane rules of interpretation. This object is to assure to the unfortunate debtor, and his equally unfortunate but more helpless family, the shelter and influence of home. A co-tenant may lawfully occupy every parcel of the lands of the co-tenancy. He may employ them not merely for cultivation or for other means of making profits, but may also build houses and barns, plant shrubs and flowers, and surround himself with all the comforts of home. His wife and children may of right occupy and enjoy the premises with him. Upon the land, of which he is but a part owner, he may, and in fact he frequently does, obtain all the advantages of a home. These advantages are none the less worthy of being secured to him and his family in adversity because the other co-tenants are entitled to equal advantages in the same home. That he has not the whole is a very unsatisfactory and a very inhumane reason for depriving him of that which he has." Mr. Thompson, in his work on Homesteads and Exemptions, § 188, says: "One can easily



imagine cases where the rule that there can be no homestead in estates held in common would work peculiar hardship to poor debtors, and defeat the apparent purposes of the homestead laws. Thus, the parents die, leaving two sons, their sole heirs, in possession of the home farm. They, finding the premises incapable of an equitable partition without sale, and knowing that the property would be sacrificed by sale, determine to reside together, with their respective families, in the common dwelling, and work the farm in common. Under the view animadverted upon, neither can claim a homestead therein as against creditors, although the value of his interest is less than the value of the statutory exemption. But it is not necessary to search the imagination for hard cases, for the books furnish them. Thus, in one case the right of homestead was denied in lands held by a husband, his wife, and their child as tenants in common. It was also denied in favor of a creditor to a tenant who was the sole occupant of premises, holding title to an undivided seventeen-eightieths of the entire estate, which title he had purchased under the belief that he had acquired the entire estate. The absurdity of such rulings is illustrated by the fact that if he had been a naked trespasser disputing the title of the real owner the same court would have accorded to him the benefit of the exemption as against his creditor." We prefer to base our decision upon the law construed by the aid of humane principles, rather than upon the technical doctrine of *ab inconvenienti*, and, therefore, hold that the lower court did not err in adjudging that the respondents were entitled to claim a homestead in land held as co-tenants. Judgment affirmed.

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UNITED STATES, Defendant in Error, v. CARPENTER, Plaintiff in Error.

**Criminal Law — Conspiracy — Indictment — Sufficiency.**

An indictment for conspiracy to defraud under § 5440, U. S. R. S., alleged that the defendants R., C. and H. on the 28th day of March, 1882, at Sioux Falls, Dakota Territory, within the jurisdiction of this court, did conspire, combine, confederate and agree together, with intent to defraud some person to the grand jurors unknown, unlawfully to falsely make, forge and counterfeit a certain obligation and security of the United States,

known as a certificate of deposit with the assistant treasurer of the United States on account of the appropriation for surveys of the public lands; that the said H., together with the said persons in execution of the last-mentioned premises, and in pursuance of, and to effect the object of said conspiracy, combination and agreement between themselves, afterward, on the 6th day of April, 1882, at said place, did unlawfully and with intent to defraud some person to the grand jury unknown, falsely make a certain paper and writing in words and figures following: [This is an assignment of the certificate by George Beeker, the payee thereof. As to the form and sufficiency of this for the purpose intended, no question is made.] Which said paper and writing was then and there intended by the defendants to falsely represent and purport to be a written assignment by George Beeker of a certain pretended obligation and security of the United States; that afterward on said 6th day of April, 1882, at said place, the said C., in pursuance of and to effect the object of the conspiracy aforesaid, did falsely and fraudulently and with intent to defraud some person to the grand jurors unknown, paste and attach the paper and writing aforesaid to and upon a certain falsely made, forged and counterfeited obligation and security of the United States, which said falsely made, forged and counterfeited obligation and security was then and there in writing and as follows, to-wit: [The certificate of deposit is here given. Its sufficiency is not questioned], contrary, etc. *Held*, that the indictment did not state facts sufficient to constitute an offense.

(Argued and determined at the October Term, 1889.)

**E**RROR to the district court, second judicial district; Hon. A. J. EDGERTON, Judge.

The plaintiff in error, Edwin E. Carpenter, was indicted for conspiracy to defraud the United States in issuing what was known as land scrip under the laws as to surveys of public land. The only question presented to this court was the sufficiency of the indictment.

After a jury had been impaneled in the case, and the prosecution was proceeding to offer testimony, Carpenter, the defendant below, objected to the introduction of any proof under the indictment, on the ground that it did not state facts sufficient to constitute a public offense. The court overruled the objection and the defendant excepted. At the close of the testimony for the prosecution the same objection was again made and denied. The defendant offered no evidence. The case was submitted to the jury under instructions by the court, and a verdict of guilty was returned. A motion for a new trial, and one in arrest of judgment were made and overruled, and after the entry of final judgment, the defendant sued out this writ.

The indictment (using the initial letters of the names of the other defendants) was as follows :

The grand jurors of the United States in and for the said Second Judicial District and Territory of Dakota, inquiring in and for the body of said district of all crimes and public offenses against the laws of the United States committed and triable in said district, having been first duly and legally impaneled, charged and sworn according to law, upon their oaths present : That on the 28th day of March, in the year of our Lord one thousand eight hundred and eighty-two, at the town of Sioux Falls, in the said Second Judicial District and Territory of Dakota, and within the jurisdiction of this court, one R., late of said district and territory, and one C., late of said district and territory, and one H., late of said district and territory, and one Edwin E. Carpenter, late of said district and territory, being persons of evil minds and dispositions, together with divers other evil-disposed persons whose names are to the grand jurors as yet unknown, unlawfully and wickedly did conspire, combine, confederate and agree together, with intent to defraud some person to the grand jurors unknown, unlawfully to falsely make, forge and counterfeit a certain obligation and security of the United States, known as a certificate of deposit, with the assistant treasurer of the United States, on account of the appropriation for surveys of public lands, which said obligation and security is hereinafter set forth in words and figures. And the grand jurors aforesaid, upon their oaths aforesaid, do further present : That the said H., together with the said evil-disposed persons, in execution of the said last-mentioned premises and in pursuance of, and to effect the object of the said conspiracy, combination and agreement between and amongst themselves as aforesaid, afterward, to-wit : on the sixth of April, in the year of our Lord one thousand eight hundred and eighty-two, at the town of Sioux Falls, in said district and territory, and within the jurisdiction of this court, did unlawfully, and with intent to defraud some person, to the grand jurors unknown, falsely sign and write the words "George Beeker," and the word "Sept." and the word "Nov." and the figures "2" and "20" to and upon a certain paper and writing, which said paper was then and there in the printed and written words and

figures following, to-wit: For value received, I, George Beeker, to whom the attached duplicate certificate of deposit No. 77, issued on the 2d day of Sept. A. D., 1881, by assistant United States Treasurer at.....was issued.....I hereby sell and assign unto.....of.....county and state of.....and to his heirs and assigns forever, the said certificate of deposit with all the benefits to be derived therefrom.

Attest:

GEORGE BEEKER (*Seal*).

STATE OF LA.,  
County of De Seta, } ss.

On this 20th day of November, A. D. 1881, before me came George Beeker to me well known, and acknowledged the foregoing assignment to be his act and deed. I certify that said George Beeker is the identical person to whom the attached certificate of deposit was issued, and that he executed the foregoing assignment thereof.

{ James E. Clark,  
Notary Public,  
Louisiana. }

J. E. CLARK,

*Notary Public.*

Which said paper and writing was then and there intended by said defendants, together with said evil-disposed persons, to falsely represent and purport to be a written assignment made by one George Beeker of a certain pretended obligation and security of the United States, hereinafter more fully set forth in words and figures. And that afterward, to-wit: On the sixth day of April, in the year of our Lord one thousand, eight hundred and eighty-two, at the town of Sioux Falls, in said district and territory, and within the jurisdiction of this court, the said C., in pursuance of, and to effect the object of the conspiracy aforesaid, did falsely and fraudulently, and with intent to defraud some person, to the grand jurors unknown, paste and attach the paper and writing aforesaid to and upon a falsely made, forged and counterfeited obligation and security of the United States, which said falsely made, forged and counterfeited obligation and security of the United States was then and there in the written and printed words and figures following, to-wit:

No. 77.

OFFICE OF ASSISTANT TREASURER, U. S.,  
NEW ORLEANS, LA., *Sept. 2, 1881.* }

Triplet to be retained by the Depositor.

*I CERTIFY That* GEORGE BEEKER has deposited One Hundred and Eighty-six Dollars with the Assistant Treasurer of the United States, on account of appropriation surveys for lands in Town 16, Range 24, for which I have signed triplicate receipts. BENJ. F. FLANDERS (*seal*), *Assistant Treasurer, U. S.*

\$186.

Contrary to the form of the statute of the United States in such cases made and provided, and against the peace and dignity of the United States. Hugh J. Campell, U. S. Attorney.

*Gamble Bros.*, for plaintiff in error.

The certificate set out is not within the meaning of section 5413, R. S. This was the last section of chapter 172, act of June 30, 1864, and is to be construed with that act. There is, then, no offense charged against the United States. *U. S. v. Payne*, 22 Fed. Rep. 726; *U. S. v. Sauche*, 7 id. 715; *U. S. v. Watson*, 17 id. 145.

The acts charged as effecting the objects of the conspiracy are insufficient. *U. S. v. Hirsch*, 100 U. S. 34; *U. S. v. Watson*, *supra*; *U. S. v. Milner*, 36 Fed. Rep. 890; *U. S. v. Babcock*, 3 Dill. 581; *U. S. v. Goldberg*, 7 Biss. 175; § 355, C. C. Pro.; § 227, Pen. C.; *U. S. v. Cruikshank*, 92 U. S. 542; *U. S. v. Walsh*, 5 Dill. 61; *U. S. v. Carll*, 105 U. S. 611. Nothing is charged beyond a conspiracy to forge and counterfeit. If there were, a count for uttering the acts might be sufficient for that, but could not be for the purposes here sought.

The indictment is also insufficient in that it does not allege that Flanders was an assistant treasurer of the United States. *U. S. v. Reichert*, 32 Fed. Rep. 142.

*J. C. Murphy*, U. S. District Attorney, and *E. G. Smith*, for defendant in error.

Carpenter, with others, was indicted under section 5440, U. S. R. S. The object of the conspiracy was the forgery of a "certificate of deposit," with intent to defraud. Two acts to effect the

object are alleged; the forging of the assignment of the certificate and the attaching it to the certificate.

The authority for making these deposits are found in section 2401. See, also, §§ 2402, 2403.

Section 5413 defines an obligation or security of the United States.

Two classes of conspiracies are included in section 5440: 1. To commit any offense against the United States. 2. To defraud the United States in any manner, or for any purpose. The indictment relates to the first, and in its statement of facts is sufficient. *U. S. v. Donau*, 11 Blatchf. 170; 2 Whart. Prec. 6, 607; *State v. Sterling*, 34 Ia. 443; *Horton v. State*, 66 Ga. 690; *Com. v. Eastman*, 1 Cush. 190, 48 Am. Dec. 608; *People v. Clark*, 10 Mich. 310; *Hartman v. Com.*, 5 Pa. St. 60; *State v. Noyes*, 25 Vt. 418; Arch. Cr. P. (5th ed.) 262, 437, 458, 485; 2 Bish. Cr. Pro. 22, 204. The means used to defraud need not be set out. *United States v. Gordon*, 22 Fed. Rep. 250.

The crime consists in the unlawful combination and the intent. The other matters required to be set out, in addition to some "act tending to effect the object," are such circumstances as will enable the defendant to understand what he is charged with doing. Whart. Cr. L. (8th ed.) 728. Here there is a copy of the forged instrument. This is sufficient. 2 Bish. Cr. Pro. 414; *Com. v. Castles*, 9 Gray, 120; *Croswell v. People*, 12 Mich. 427; *U. S. v. Trout*, 4 Biss. 107; *U. S. v. Williams*, id. 305; § 5413, R. S.

The certificate is within section 5413. This section is not a copy of the section referred to.

As a matter of pleading, we think it is not necessary that the acts should appear on the face of the indictment to be such as would "tend to effect the object of the conspiracy." *U. S. v. Donau*, *supra*; *U. S. v. Sauche*, 7 Fed. Rep. 715. On this point counsel's citations are explained in being cases where legal conclusions were alleged, or cases where the issue was not upon the indictment. Here the acts were not only such as might tend to effect the object, but were necessary to accomplish it, viz.: to sell the certificate. An indorsement of a forged bill may be given in evidence, although not alleged in the indictment. *U. S. v. Peacock*, 1 Cr. C. C. 215.

It is sufficient that the certificate purports to be signed by an assistant treasurer. See above authorities. This is well settled.

By the COURT :

The judgment in this case is reversed, and the court below is directed to dismiss the indictment. All concur except TRIPP, C. J., TEMPLETON and AIKENS, JJ., not sitting.

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TERRITORY OF DAKOTA, Defendant in Error, v. ANDERSON, Plaintiff in Error.

**Criminal Law — Larceny — Indictment — Sufficiency.**

Under a statute defining larceny to be "the taking of personal property accomplished by fraud or stealth, and with intent to deprive another thereof," an indictment (omitting time and place) charging that the defendant "did fraudulently and feloniously, steal, take and carry away divers bank bills, commonly known and denominated as national currency, of divers denominations, the numbers and denominations of which are to the grand jury unknown, of the amount and value of \$25, which said bills circulated and passed as money, and which were then and there the property and in the possession of one Bruno Theil, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the Territory of Dakota," is sufficient on motion in arrest of judgment.

(Argued at the May Term, 1889, and determined at the October Term, 1889.)

**E**RROR to the district court, Minnehaha county; Hon. F. R. AIKENS, Judge.

The defendant, John Anderson, was convicted of the crime of grand larceny. At the proper time he moved the court in arrest of judgment, "for the reason that the facts stated in the indictment \* \* \* do not constitute a public offense." This motion was denied and final judgment was entered against him, whereupon he sued out this writ.

The indictment and the statute defining the offense are stated in the head-note.

*Winsor & Kittredge*, for plaintiff in error.

Larceny, in this territory, is a statutory crime. § 508, Pen. C. The indictment is insufficient, for, assuming it good in other re-



spects, it does not appear that the property was taken "with the intent to deprive another thereof."

*Johnson Nickens, Attorney-General*, for defendant in error.

Under the rules of pleading prescribed by the C. Cr. Pro., and the authorities under like statutes, the indictment is sufficient. §§ 214, 215, 221; *People v. King*, 27 Cal. 513; *People v. Vance*, 21 id. 400; *Berg v. State*, 2 Tex. App. 148.

By the COURT :

The judgment in this case is affirmed. All of the justices concur except AIKENS, J., not sitting.

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FIRST NATIONAL BANK OF LOS ANGELES, Appellant, v. DICKSON ET AL., Respondents.

**Trover and Conversion — Title, Sufficiency of Evidence to Sustain.**

In an action for the conversion of certificates of deposit by an indorsee bank, against persons who had taken them from its correspondent on an attachment against its immediate indorser, the fact that the plaintiff bank on hearing of the dishonor of the certificates charged them back to the indorser on his account, is not sufficient evidence of want of title to the certificates to authorize the court in directing a verdict against the plaintiff bank.

(Argued at the May Term, 1889, and determined at the October Term, 1889.)

**A** PPEAL from the district court, Minnehaha county; Hon. J. E. CARLAND, Judge.

This was an action by the First National Bank of Los Angeles, California, plaintiff, against J. M. Dickson and G. H. Hollister, defendants, to recover the value of three certificates of deposit taken by them from the plaintiff.

It appeared that the certificates had been issued by the First National Bank of Sioux Falls, Dakota, to one J. B. Young; that Young deposited them with the plaintiff bank; that it sent them forward for collection, and when they reached Sioux Falls they were attached as the property of Young, at the suit of Hollister against Young. The other defendant, Dickson, was the sheriff

who had taken the certificates on the writ. At the trial the court directed a verdict against the bank, on the ground that it had failed to prove title to the certificates. The certificates, differing in amount, were all in the following form :

“\$3,000. THE FIRST NATIONAL BANK OF SIOUX FALLS,  
SIOUX FALLS, Dakota, *December 24, 1885.* }

“J. B. Young has deposited in this bank, three thousand dollars, payable in current funds to the order of himself, on the return of this certificate properly indorsed.

“No. 7805. Int. 6% per annum.

“W. F. FURBECK, *Cashier.*”

These certificates were indorsed to the plaintiff bank by Young, February 26, 1886, and he received credit for them on his account with the bank as a money deposit. They were then returned to Sioux Falls by the plaintiff bank for collection and while in the hands of its correspondent were attached by the defendants, March 6, 1886. At about this time the plaintiff heard the standing of the bank issuing the certificates was not good, or that it had dishonored the certificates thereupon March 10, it charged them back to Young in his account upon its memorandum check. There was no evidence that Young ever consented to their being charged back. There was, however, a statement of his account, May 19, 1886, in evidence showing this charge, and an overdraft of \$1,434.49. The certificates were protested for non-payment. At the time of the trial the certificates were still in the possession of the sheriff. This action was commenced June 30, 1886.

Upon the above evidence the defendants moved the court to direct a verdict in their favor. On this motion the court held, “I think that when Young indorsed the certificates to the bank, title passed to the bank, but when they were returned and charged back, that title passed back to Young.” It thereupon directed a verdict as requested. After the denial of a motion for a new trial and the entry of final judgment the plaintiff appealed.

*Winsor & Kittredge*, for appellant.

The only question for determination is, in whom was the title to the certificates? The certificates were negotiable. § 1829, C.

C.; *Miller v. Austin*, 13 How. 218; *Pardee v. Fish*, 60 N. Y. 265; 1 Rand. Com. P., § 89. By the indorsement and credit appellant obtained absolute title. §§ 1829, 1835, 1852, 1853; *Brown v. Spafford*, 95 U. S. 474; *Brown v. Wiley*, 20 How. 442; *Dobbins v. Oberman*, 22 N. W. Rep. 352; *Wayland v. Bowman*, 56 Wis. 657; *Johnson v. Lewis*, 6 Fed. Rep. 27; *Poorman v. Mills*, 35 Cal. 118; *Curtis v. Sprague*, 51 id. 239; *Bank v. Lloyd*, 90 N. Y. 530; *Marbourg v. Lloyd*, 21 Kan. 545; *Railroad Co. v. Johnson*, 27 Fed. Rep. 243. This would certainly be the case in this kind of an action against everybody but Young. *Hilliard, Torts*, 55; *Whart. Ev.*, § 1336; 2 Gr. (13th ed.), § 172; *Seybel v. Nat. C. Bk.*, 54 N. Y. 288. Title could have passed back to Young again only by contract or operation of law. Of the former there is absolutely no proof, and of the latter the proof was insufficient. §§ 965, 967, C. C.; *Gay v. Alter*, 102 U. S. 79; *Lancaster v. Haver*, 6 Atl. Rep. 141; *Hunt v. Silk*, 5 East, 249; *Beed v. Blanford*, 2 Y. & J. 278; 2 Pars. Cont. (7th ed.) 679; *Robinson v. Howes*, 20 N. Y. 84; *Grant v. Low*, 29 Wis. 99; *Francis v. Railroad Co.*, 108 N. Y. 93; *Dougherty v. Bank*, 93 Pa. St. 227; *Byard v. Holmes*, 33 N. J. L. 119; *Bank v. Newell*, 71 Wis. 309.

*Bailey & Davis*, for respondents.

The evidence fails to show title in the appellant. The fact of its receiving the certificates from Young raises no presumption of continued ownership without possession.

By appellant's charging them back, Young became vested with title. It could not hold the certificates and retain the credit and it cannot be heard to complain of its own act. Under banking customs it had the right to charge them back. *Balbach v. Frelinghuysen*, 15 Fed. Rep. 683; *Morse*, § 565. By the protest Young's liability become fixed on his indorsement (1 Daniel, § 669), and to satisfy this liability the bank could appropriate any of his funds on deposit. *Morse*, §§ 557, 559; *Manderville v. Bank*, 9 Cr. 9; *Ætna Nat. Bk. v. Bank*, 46 N. Y. 88; *Indig v. Nat. C. Bk.*, 80 id. 106; 1 Daniel, § 29; *Muench v. Valley Nat. Bk.*, 11 Mo. App. 144. The bank was under no obligation to seek Young, his duty was to come after the certificates. The case is analogous to the sale of personal property without delivery. 2

Blacks. 448. The vice of appellant's contention is that the return of the certificates must precede the right to charge them back. None of its citations sustain such doctrine.

By the Court:

The judgment in this case is reversed and a new trial is ordered. All the justices concur except SPENCER, J., not sitting.

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PLYMOUTH COUNTY BANK, Respondent, v. GILMAN, Appellant.

**Pledge and Collateral Security — Enforcement — Negligence — Evidence — Sufficiency.**

On an issue of a creditor's negligence in enforcing collateral securities (notes and a mortgage) the fact that the creditor placed them in the hands of reputable attorneys for collection would not warrant the court in directing a verdict in his favor on this issue where the evidence tended to show the security was lost by the negligence of the attorneys.

(Argued at the May Term, 1889, and determined at the October Term, 1889.)

**A** PPEAL from the district court, Minnehaha county; Hon. J. E. CARLAND, Judge.

This was an action by the Plymouth County Bank, plaintiff, against Frazier Gilman, defendant, upon a promissory note. The defendant admitted the execution of the note, but alleged by way of counter-claim that at the time the note was delivered he was the owner and holder of six promissory notes and a mortgage given to secure them by one Mason and his wife; that he delivered these notes and the mortgage to the plaintiff with the understanding that when they became due it would proceed to collect them, apply the proceeds to the note described in the complaint and pay the balance over to the defendant; that at the time of the delivery of said notes and mortgage they were worth their face value; that plaintiff neglected and refused to comply with its agreement as to the collection of said note, though often requested so to do by the defendant; that the said Mason became insolvent and the property upon which the mortgage was given, worthless. The defendant demanded judgment for the difference between the note sued on and the six promissory notes. In reply to the counter-claims the plaintiff alleged that shortly after the first of

the six notes matured, it sent the notes and mortgage to a certain firm of attorneys in the county where the mortgage premises were situated, and instructed them to collect the same and foreclose the mortgage; that the said attorneys did commence the foreclosure of said mortgage, but it was done so negligently and carelessly that no valid decree was rendered in the case; that the said attorneys were reputable and responsible. At the trial it was admitted the notes and mortgage described in the counter-claim were delivered to the plaintiff as collateral security for the payment of the note described in the complaint. The other evidence tended to support the allegations of the counter-claim and reply. The necessities of this appeal do not require reference to more of it than relates to the standing of the firm of attorneys to whom the securities had been sent for collection. On this subject the plaintiff put one witness on the stand, an attorney at law, and he testified that he had known this firm of attorneys for several years and that it was one of the most reputable law firms in the territory and the leading firm in the city where they resided. There being no dispute in the evidence as to the standing of the firm, the plaintiff moved the court to direct a verdict in its favor. The motion was granted and the defendant excepted. After the denial of a motion for a new trial and the entry of final judgment the defendant appealed.

*C. S. Palmer*, for appellant.

It was the duty of respondent to so conduct itself in regard to the securities that appellant should sustain no injury, either by its *omission* or commission. *Roberts v. Thompson*, 14 Ohio St. 1; *Jennison v. Parker*, 7 Mich. 355; *Cutting v. Morton*, 78 N. Y. 454; *Lyon v. Bank*, 12 S. & R. 61; 4 Ind. 425; 93 Ill. 458; 62 Pa. St. 47; 79 id. 106; 21 id. 237; 2 McCrary, 505.

*C. H. Winsor*, for respondent.

The question for determination is, was appellant guilty of negligence. While it would be liable for its own gross negligence, still, if it employed an attorney to make the collection and exercised reasonable care in so doing, it has discharged its duty and is not liable for the misconduct or gross negligence of the attorney.

Colebrook, Colla. Secu., 116; Commercial Bank v. Martin, 1 La. 344; Exeter Bank v. Gordon, 8 N. H. 66; Goodale v. Richardson, 14 id. 567. The proof was undisputed that the attorneys employed were reputable. There was no evidence that their omission to do their duty was attributable to the plaintiff. It is not liable as for negligence. It was only required to act in good faith. Black River Bank v. Page, 44 N. Y. 453; Colebrook, 114.

By the COURT:

The judgment in this case is reversed and a new trial is ordered. All of the justices concur.

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BURTZ, Respondent, v. COLTON, Appellant.

**1. Appeal — Review — Findings — Insufficiency of the Evidence.**

Where there is no substantial conflict in the evidence and the findings are against the weight of the evidence, an appellate court will reverse a judgment founded on such findings.

**2. Same — Specific Performance — Contract — Validity.**

In an action for specific performance the plaintiff obtained a decree on the contract, modified, as he contended; but the contract, however, was that the defendant, in consideration of the plaintiff's undertaking to have the county in which the land was situated organized, the county seat placed near the land and a certain railroad constructed there, agreed to convey to him sixty acres in a certain quarter section less such amount as he should find necessary to give the railroad company to induce it to come, and (after the county had been organized and the county seat located as contemplated) the plaintiff contending that the company had agreed to come for forty acres, and that the original contract had been modified by parol so that he was to have the balance of the sixty acres in another quarter section and that there had been a part performance of the contract as modified, but the evidence on these issues showing merely the expression of opinion by the agent of the company that he thought the road could be induced to come for forty acres, and it appearing the defendant had obligated himself to the company to convey to it sixty acres to induce it to come, and that he had not been released from that obligation, and it also appearing that the alleged part performance could as well be referred to the defendant's obligation to the company as to the alleged modified contract, *held*, the decree should be reversed and that the contract itself was not of a character to appeal strongly to a court of equity for enforcement. PALMER, J., dissenting.

**3. Same—Part Performance.**

An act in part performance must be with reference to the particular contract sought to be enforced.

**4. Contract — Modification — Sufficiency of Evidence.**

The modification of a written contract by a parol agreement must be clear and satisfactory.

(Final argument Feb. 21, 1888; reversed Feb. 24, 1888; opinion filed Oct. 9, 1889.)

**A** PPEAL from the district court, Cass county; Hon. S. A. HUDSON, Judge.

The court below found that by the parol modification of the contract the respondent was to have the land to which he was entitled from section 11 instead of section 1 as provided in the written contract. All of the other facts appear in the opinion.

*Stone & Newman*, for appellant.

The rule as to the specific performance of parol contracts for the conveyance or exchange of lands is, that the party should be held rigidly to full, satisfactory and indubitable proof of the contract: (1) Such proof must be clear, definite and conclusive. (2) It must show that the consideration has been paid or tendered. (3) It must show such a part performance of the contract, that its rescission would be a fraud on the other party and could not be fully compensated by a recovery at law. (4) It must show that delivery of possession has been made in pursuance of the contract and acquiesced in by the other party. *Waterman*, Spec. Perf., § 265; *Colson v. Thompson*, 2 Wheat. 336; *Purcell v. Miner*, 4 Wall. 513; *Phillips v. Thompson*, 1 Johns. Ch. 131; *Lobdell v. Lobdell*, 36 N. Y. 327; *Knoll v. Hervey*, 19 Wis. 110; *Blanchard v. McDougal*, 6 id. 165; *Delavan v. Duncan*, 49 N.Y. 485; *Harris v. Knickerbocker*, 5 Wend. 638; *Lester v. Kinne*, 37 Conn. 9; 1 Story, Eq. Jurisp., §§ 764, 767; *Pomeroy*, Spec. Perf., § 136; *Odell v. Morin*, 5 Oreg. 96; *Wood*, Frauds, 65.

Applying these rules to the case the evidence fails to show that the pretended parol modification was ever made, it is not a case of insufficiency of evidence but total failure of proof. Not only does the evidence fail to show any modification for an exchange, but all the circumstances connected with the matter conclusively establish that no such parol modification ever existed. But even if the modification claimed had been made, no such part performance is shown that rescission would be a fraud on respond-



ent and could not be fully compensated by damages. The part performance required to take the case out of the statute is a delivery of possession and the making of improvements in good faith, so that a failure to enforce the contract would place the vendee in the position of a trespasser and subject him to the loss of his improvements and a payment of the purchase-price. Pomeroy, Spec. Perf., §§ 115-130; Waterman, Spec. Perf., §§ 262, 270, 272; Story, Eq. Jurisp., § 761; Fry, Spec. Perf., § 562; Horn v. Ludington, 32 Wis. 73; Edwards v. Estell, 48 Cal. 194; Townsend v. Fenton, 21 N. W. Rep. 726; Percell v. Miner, 4 Wall. 513; Baker v. Wiswel, 22 N. W. Rep. 111.

It is claimed the consideration has been paid by the performance of the services stipulated by the contract; even if this were so, it would not be such a part performance as would have entitled respondent to a decree. Pomeroy, Spec. Perf., § 109; Wood, Frauds, § 496; 2 Suth. Dam. 453; Horn v. Ludington, 32 Wis. 73; Edwards v. Estell, 48 Cal. 194; Wallace v. Long, 5 N. E. Rep. 666.

The platting and conveyance to the railroad was not in pursuance of the contract between appellant and respondent.

The written contract and its pretended oral modification are void as against public policy. The main object of the contract was to secure the location of the county seat of Ransom county at Lisbon and the appointment of men nominated by appellant as county commissioners of that county. Chap. 21, Pol. C.; Oscanyan v. Armes Co., 103 U. S. 261; Bartle v. Nutt, 4 Pet. 184; Holliday v. Patterson, 5 Oreg. 177; Tryst v. Child, 21 Wall. 441; Tool Co. v. Norris, 2 id. 45; Rose v. Truax, 21 Barb. 361; Gray v. Hook, 4 N. Y. 449; Meguire v. Corwine, 101 U. S. 108; Harris v. Roof, 10 Barb. 489; Marshall v. Baltimore & O. R. R. Co., 16 How. (U. S.) 144; Hannah v. Fife, 27 Mich. 172; Edwards v. Estelle, 48 Cal. 194; Fuller v. Dame, 18 Pick. 472; Gould v. Kendall, 19 N. W. Rep. 483; St. Joseph R. R. Co. v. Ryan, 15 Am. Rep. 357; Greenhood, Public Policy, 357.

*A. D. Thomas and Wilson, Ball & Wallin*, for respondent.

The authorities cited by appellant to the effect that the proof of an oral agreement within the statute of frauds must be "full,

clear and satisfactory," state the rule by which evidence is weighed in courts of original jurisdiction and in those appellate courts in which, in equity causes, the whole case is taken up, the evidence examined and a decree rendered on appeal, without regard to the findings of the lower court. Under the Code of this territory, however, the supreme court, when reviewing the findings of the district court will no more weigh conflicting evidence in an equity case than in one at law. *Duggan v. Davey* (Dak.), 26 N. W. Rep. 887, 889; *Ritter v. Stock*, 12 Cal. 402; *Doe v. Valejo*, 29 id. 386; *Donohoe v. Mariposa L. & M. Co.*, 66 id. 317, 327.

There was part performance that took the contract out of the operation of the statute of frauds. *Fry*, Spec. Perf., §§ 557, 562-564; *Malins v. Brown*, 4 N. Y. 403; *Fisher v. Moolick*, 13 Wis. 321; *Daniels v. Lewis*, 16 id. 140; *Paine v. Wilcox*, id. 202; *Martineau v. May*, 18 id. 54; *Waterman*, Spec. Perf., §§ 261, 270; *Livingston v. Livingston*, 2 Johns. Ch. 537; *Ryan v. Dox*, 34 N. Y. 307, 319; *Williams v. Marris*, 95 U. S. 444, 456; *Edwards v. Estell*, 48 Cal. 194; *Brown v. Mury*, 3 S. W. Rep. 175; *Farwell v. Johnson*, 34 Mich. 342; *Pomeroy*, Spec. Perf., § 117.

The illegality of the contract as being opposed to public policy was not pleaded. While a court is at liberty to determine such a question of its own motion, and is bound to do so at the instance of a party by whom it has been properly raised, still, if the defendant has not plead the illegality, and the trial court has not declared it illegal, but rendered a judgment thereon against the defendant, an appellate court will refuse to interfere. *Goss v. Austin*, 11 Allen, 525; *Bradford v. Tinkman*, 6 Gray, 494; *Cardose v. Swift*, 113 Mass. 250; *Finlay v. Quirk*, 9 Minn. 194, 198; *Dingeldein v. Third Ave. R. Co.*, 9 Bosw. 79, 91; *Schreyer v. Mayor* 39 N. Y. Sup. Ct. 1; *Atchinson v. Miller*, 21 N. W. Rep. 452; *Sharon v. Sharon*, 8 Pac. Rep. 614.

The contract is not opposed to public policy. The presumption is that the parties intended what was legal. *Pratt v. Am. Bell Tel. Co.*, 5 N. E. Rep. 308; *Greenhood*, Pub. Policy, 26. See, also, *Oscanyan v. Armes*, 103 U. S. 261, 275; *Trist v. Child*, 21 Wall. 441; *Wright v. Tibbits*, 91 U. S. 252; *Wylie v. Coxe*, 15 How. 415; *Stanton v. Embry*, 93 U. S. 548.

On examination it will be found that all the authorities cited

by appellant fall within one or more of the following classes: (1) Where the contract is one necessarily tending to a violation, by one of the parties, of some special duty which he owes to the government, or a third person; (2) to interfere with the business operations of the government; (3) contemplates, or will lead to the employment of secret and sinister attempts and influences upon members, to affect the action of an official or legislative body; and (4) where the contract is in effect an agreement for the sale of personal influence, to be exercised upon a public officer in the discharge of his duties. This case does not fall within the doctrine of any of the authorities cited.

TRIPP, C. J. This is an action in the nature of a suit for specific performance of contract. The case was tried to a referee, upon whose report the court made separate findings of fact and conclusions of law, directing an enforcement of the contract, and from the judgment so entered the defendant appeals to this court.

It appears from the record of the case that in the fall of 1880, and prior thereto, the defendant, Colton, was the owner or claimant of four hundred acres of land, upon which the town of Lisbon, Ransom county, now stands; that several surveys had been made by the south-western branch of the Northern Pacific railroad, near this land,—one north, one south, and one through it. The defendant was anxious to secure the railroad through his place, and negotiations were being had between him and the railroad company, represented by one Delano, its general construction and town-site agent. The company demanded the right of way through defendant's land, and eighty acres in lots to be selected by the company from one hundred and sixty acres to be platted by the defendant and one Harris, an adjoining claimant; but, finally, some time in December, 1880, or January, 1881, it was agreed between defendant and the company (a memorandum of which was in writing and subsequently embodied in form of a written agreement) that the road should be so changed as not to cut through the defendant's land, but only across its south-east corner; and that the defendant should give to the railroad company the one-half of one hundred and twenty acres of said land, to be platted into lots and blocks, each selecting therefrom alternate half-blocks, etc. Subsequently, on the 5th of February, 1881, the defendant

entered into a contract with plaintiff, which forms the subject-matter of this suit, and the substantial parts of which, omitting the formal parts, are as follows :

“The party of the first part represents that he is the owner of certain land at the place called ‘Lisbon,’ in said county, to-wit: West  $\frac{1}{2}$  of S. W.  $\frac{1}{2}$  of section one, eighty acres; also the E.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  of section two, it being eighty acres; also the N. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$ , and the S. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$ , of section two, being eighty acres; and also the N. E.  $\frac{1}{4}$  of section eleven, it being one hundred and sixty acres,—in all, four hundred acres. The party of the first part desiring to have the said county of Ransom organized, and the county seat located at said town of Lisbon, and the said party of the first part being desirous of having the south-west branch of the Northern Pacific railroad cross the Cheyenne river at said town of Lisbon, at or near the line now located by said railroad company, therefore the said party of the first part agrees to employ, and does hereby employ, Charles W. Buttz, the party of the second part, as his attorney and agent for the purpose of working to accomplish the above-named object in such manner as said Buttz shall think proper. The said Buttz agrees to visit or have some other person visit Yankton, Dakota, if necessary, in the interest of the party of the first part, and to employ and obtain the assistance of any person or persons that he may see fit to aid in the work of accomplishing the object of this agreement. Now, if the said railroad crosses the said river at or near the line now located at the said town of Lisbon, and the county seat of said county is located at said town of Lisbon, then and in that case the party of the first part agrees to sell, and does hereby sell and assign, unto said Buttz, party of the second part, sixty acres of said land, to be selected as follows: The party of the first part agrees to have one hundred and twenty acres laid out in town lots, said lots to be situated as follows: Sixty acres in N. E.  $\frac{1}{4}$  of section eleven, twenty acres in E.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$  of section two, forty acres in the west  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$  of section one; all being in said township 134, range 56, Ransom county. The parties hereto agree to take each alternate lot. The said Buttz, party of the second part, agrees to pay or give to the said S. W. branch of the Northern Pacific

Railroad Company any and all the lands that may be agreed upon by said Buttz and railroad company, necessary to secure said location, out of the said sixty acres; and the parties to this agreement hereby agree that the said railroad company shall have the right to take any alternate block or blocks, acres or parts of acres, or lots in any part of said described lands. All lands so taken by said railroad company, after being agreed upon, shall, as aforesaid, be deducted out of said sixty acres to be paid over to party of second part. The party of the first part hereby agrees to make a deed free of charge for the number of acres or lots agreed upon to said railroad company, and then the said party of the first part agrees to make a deed conveying the remainder of the said sixty acres, blocks, or lots to the said C. W. Buttz, party of the second part, for and in consideration of the duties and services rendered and to be rendered; said conveyances to be free of all charges, except the services said Buttz renders as attorney to party of the first part. If any other railroad should be built upon another line than the one mentioned in this agreement, into the said town of Lisbon, before the road mentioned in this agreement, then this agreement to be null and void. It is further agreed that unless commissioners are appointed within sixty days from date of this agreement, to organize said county, then this agreement to be void."

It appears that commissioners were appointed within the sixty days, and that the county seat was located at Lisbon, as contemplated by the contract. There is some conflict as to whether the road was located as contemplated by the agreement; and there are other matters of contention between the parties as to whether other minor conditions of the contract were fulfilled by the plaintiff; but in the view we have taken of the case, it will not be necessary to consider them.

The defendant subsequently planted one hundred and twenty acres of said land, and conveyed to the railroad company each alternate one-half block, as contemplated in the agreement with the agent Delano; and he declined to convey to the plaintiff any of the land whatsoever under the contract with him. Plaintiff commenced suit against the defendant on or about the 12th of December, 1881, asking a specific performance of the written con-

tract. Subsequently, in February, 1883, the complaint was amended by leave granted, again asking a specific performance of the written contract; and in May, 1883, upon order of the court to make more specific, the complaint was again amended, setting up the parol modification of the written contract. Two questions of fact are, among others, contested by the defendant: (1) The modification of the written contract by parol; (2) that any contract was made by plaintiff with the railroad company whereby it agreed to receive less than sixty acres of land from the defendant. The findings of the court and referee complained of by the defendant are all excepted to, and the record presents all the evidence upon which these findings were made, and likewise all the evidence in the case. The case has been twice argued in this court.

A great deal of learning has been displayed in the arguments and briefs of counsel, not only upon the main questions involved, but as to how far, under our peculiar pleadings, as governed and controlled by the organic act, this appellate court can weigh and consider the evidence in an equity case; and we are referred to the case of *Stringfellow v. Cain*, 99 U. S. 613, as laying down the doctrine that in such a case as this, should there be a reversal, the court must find the facts, instead of sending it back for a new trial; and concluding therefrom that the court must weigh the evidence in such cases in the same manner as in cases formerly cognizable in chancery. The question is an interesting one, how far the court in any case on appeal, under our practice, may weigh and consider the evidence. It is sufficient for this case, however, to say that the old *scintilla* rule no longer obtains; and the courts are quite unanimous to this extent in holding that, unless there is a substantial conflict, where the finding is against the evidence the judgment will be reversed.

The plaintiff seeks to recover upon a parol modification of the written contract. Such modification, however, is not so far independent of the written contract that it can be considered as a separate contract. The modification or modified contract, so far as its consideration is concerned, is based solely upon the written contract; and the conditions upon which such written contract was based are the conditions of the modified contract. Therefore it becomes necessary to inquire what the plaintiff and defendant

did contract to do. Certain of the circumstances by which the parties were surrounded, and under which the parties contracted, are enumerated in the instrument itself. Others are detailed in the evidence, all of which are admissible in considering the character and effect of the contract; its meaning as it was understood by the parties, and as it must be construed in law.

The contract first recites that the defendant is the owner of four hundred acres of land, and that he is desirous of two things: (1) To have the county seat located thereon; (2) to have the railroad cross at that place; and he agrees to employ the plaintiff to work to accomplish these objects, and the plaintiff agrees to work to accomplish these objects. Then follow the conditions of this contract, to-wit: (1) If the railroad crosses at or near this land, and (2) if the county seat is located thereon, then the defendant shall sell a certain amount of these lands to the plaintiff, to-wit, sixty acres in the sections named, the parties taking alternate lots. Now, if the contract stopped here, its language would be reasonably plain, and its meaning reasonably clear. It would be a conditional contract, in which the defendant agreed to pay or give the plaintiff sixty acres of land for his services, upon the condition precedent that the county seat should be located, and the railroad cross his land, as therein specified; but there follows the further agreement of the plaintiff, to-wit: "He agrees to pay or give to the railroad any and all the lands that may be agreed upon by said Buttz and railroad company, necessary to secure said location, out of the said sixty acres."

It will be observed that the plaintiff agrees "to pay or give" to the railroad company. He does not agree to convey; and in the concluding part of the contract the defendant, Colton, agrees to convey to the railroad company, "free of charge, the number of acres or lots agreed upon," and also "to convey the remainder of the sixty acres" to the plaintiff. This specific enumeration in the contract establishes clearly the fact that the whole sixty acres were not to be conveyed to the plaintiff, as would be at first understood by reading that part of the contract in which he agrees "to sell," etc., to him the sixty acres, but the construction must be that plaintiff was to make an agreement with the railroad company for as small amount of the sixty acres as he could, and that the de-



fendant should convey to it the amount agreed upon, and the balance, if any, to the plaintiff. This interpretation is made clearer and more certain by the further agreement, to-wit: "And the parties to this agreement hereby agree that the said railroad company shall have the right to take any alternate block or blocks, acres or parts of acres, or lots in any part of said described lands. All lands so taken by said railroad company, after being agreed upon, shall, as aforesaid, be deducted out of the said sixty acres to be paid over to party of the second part." This agreement recognizes the fact that in no event was the defendant required to convey more than sixty acres, and that the railroad company would get as much less than sixty acres as the plaintiff could get it to consent to take. The contract between plaintiff and defendant would seem to be drawn with reference to the contract had or negotiations pending between defendant and the agent, Delano; and, though no reference is made thereto, yet the undertaking of the plaintiff is that he will get the railroad company to be satisfied with, and to take, less than sixty acres of defendant's land, otherwise he (the plaintiff) is to receive nothing under the contract. So that it is incumbent upon him to show that the railroad company has consented and agreed to take less than sixty acres from the defendant, before he (the plaintiff) can have any claim for the conveyance of the remainder to him. Here, it seems to us, is the vulnerable point of this case. The only evidence of any agreement between the plaintiff and the railroad company is the testimony of Mr. Edwards. Buttz does not claim to have made any agreement with the company himself. He says: "Major Edwards did the negotiating with him [Delano] at my request." And the agreement claimed to have been made with Delano is related by Edwards as follows: "I saw Mr. Delano several times at different places, and I told him that Major Buttz had a contract of this kind; that Colton was to give him sixty acres on certain conditions, and wanted to know if he could help it. He said that the railroad company would require sixty acres themselves. I had another talk with Mr. Delano, and in that conversation he said that he thought that the matter could be arranged by the railroad company taking forty acres from Colton, and get twenty acres from Harris; and I sent Major Buttz to him with the contract. At

that time I had never been out to Lisbon, and so don't remember details as well as I might. He said that he could get twenty acres from Harris, and take forty acres from Buttz, leaving Buttz twenty acres. I don't know what section this was in. *Question.* That was the final agreement between you, as agent for Buttz, and Delano in regard to that? *Answer.* Mr. Delano said they must have sixty acres, and, if they could get twenty acres of Harris, they would take the forty acres of Colton, leaving twenty acres for Buttz."

Edwards was interested with Buttz in getting the railroad company to take less than sixty acres, and was delegated by Buttz to make the necessary negotiations, the result of which is given above. Can it be said that this was any evidence of a contract or agreement to take forty acres on the part of the railroad company? The most that could possibly be claimed for it is the expression of an opinion by the agent of the company to the effect "that the matter could be so arranged." Does the language admit of any interpretation upon which the court can say that there was then a present, existing contract made, by which the railroad company agreed to accept forty acres from Colton, and take twenty acres from Harris? Harris was not present. He was yet to be seen. The contract could not be consummated without his assent. In fact, the minds of those present — Edwards and Delano — had only so far met as to draw out the expression of an opinion from Delano that he "thought the matter could be arranged." There is no evidence of any subsequent meeting of Edwards and Delano, and no evidence of any further conversation on the subject. Colton expressly denies any knowledge of any agreement between plaintiff and Delano or the railroad company to take less than sixty acres; but, on the contrary, he says the railroad company always insisted on the full amount, which he finally conveyed to it. Mr. Delano, called as a witness by the defense, and interrogated as to any agreement to take less than sixty acres from the defendant, says: "I never had any conversation with Mr. Buttz about forty acres, or sixty or eighty acres, or any other amount of land. I had a conversation with Edwards. *Question.* When was that? *Answer.* It was some time in 1881. *Q.* What was the conversation? *A.* It was about this contract. Edwards wanted I should

go into an arrangement by which I would release Colton, and make the arrangement directly with Buttz, instead of Colton, and take forty acres from Buttz. I asked him what I would make out of that; that I had the matter fixed up, and that I proposed to stick to it. In this conversation I got the idea that the land that was to be platted down there was forty acres; and I recollect asking Edwards, if I took forty acres, where any thing for Buttz would come from. Q. Did you in that or any other conversation with Edwards say that if he could get twenty from Harris, that you would be satisfied with forty? A. No, sir. Q. Any thing of that kind? A. No, sir. Q. Or that it could be arranged by taking forty acres from Colton, and twenty from Harris? A. No, sir. I told Edwards and Buttz that I would have nothing to do with any one but Colton or Harris; for I had made a contract with them, and that we had agreed as to what we would do. Q. State whether or not you at any time made a contract or arrangement with either Edwards or Buttz, or any one in connection with Edwards and Buttz, affecting the property in question. A. No, sir; not in any way, shape, or manner." Can it be said that this was any evidence of an existing contract upon which to base specific performance?

Again, without referring to the question of want of consideration for the alleged agreement between the plaintiff and the railroad company (although the inquiry by the agent, Delano, as to what the railroad company was to make out of the transaction by deducting twenty acres, and giving it to Buttz, would seem a very pertinent one), the objection that has urged itself most forcibly upon our attention is that, admitting some contract or agreement to have been made between Delano and the plaintiff by which the railroad company was to concede the twenty acres, is there any evidence of such a contract as would release the defendant from the claims of the railroad company upon him, and that he could plead as a defense in a suit by the railroad company requiring him to convey? Whether the agreement claimed to have been made between Delano and Buttz was one of release of right to, or an exchange of, real property, it was, in any event, a contract in relation to real property, and within the statute of frauds. *Purcell v. Miner*, 4 Wall. 517. And is there any evidence that

the contract sought to be established, or any part of it, was in writing, or that any part of it was ever performed? Did not Buttz, in his contract with Colton, bind himself to get the railroad company to agree to take less than sixty acres? Was the agreement such that it was revocable at any time on the part of the railroad company, or was it a binding agreement,—one that would protect Colton in his conveyance? Any agreement in writing whereby the railroad company had consented to Colton's conveying twenty acres to Buttz would undoubtedly have had that effect by way of estoppel, at least, if not as a contract; but, in absence of such an agreement, was Colton bound to convey to Buttz? He only agreed to convey to Buttz "the remainder of the said sixty acres, blocks, or lots," after he had conveyed to the railroad company the amount selected by it. It is true that the amount so selected by the railroad company must have first been agreed upon; but, in absence of such agreement, there was to be no conveyance to Buttz. Supposing that the agreement had been that the defendant was to convey the whole sixty acres to the railroad company, and that the railroad company was to convey to Buttz as much as he could get it to agree to do (and the real effect of the supposed agreement is not much different from the one the parties did make), could Buttz have required the railroad company to convey to him without showing that the contract he relied upon to enforce was a valid one, and was not within the statute of frauds? How, then, can he expect to recover of Colton, who, in a certain sense, was a trustee of the railroad company, without showing either a binding agreement, or such a consent to the immediate conveyance as would work an estoppel on the company?

The result of the contracts of Colton with the railroad company, and of Colton with Buttz, placed him (Colton), as we have already said, in a position in the nature of trustee as to the sixty acres of land. He was required and was willing to give that much land, and no more, to the railroad company. He was willing to convey it to the railroad company direct; or, with the consent of the railroad company, he was willing to convey twenty acres of it to Buttz himself. It would hardly be contended, if A. held land in trust for B., that C., claiming to have made a parol contract with B.,

could compel A. to convey ; and the case at bar is not essentially different. Colton holds the land subject to the agreement of Buttz and the railroad company. Whatever Buttz gets must come out of the sixty acres Colton has agreed to convey to the company. And it may not be out of place, here, to suggest that the record of this case discloses the fact that the railroad company would have been a proper, if it was not a necessary, party in determining the ultimate rights of the plaintiff and defendant. But whether Colton had made any such contract with the railroad company as would bind him to convey the whole sixty acres is not now before the court to determine. He had a right to insist that he should not be made liable so to do ; and he, therefore, had a right to insist that this plaintiff should comply with the terms of his contract, and make an agreement that would save him from any future claims of the railroad company. No such agreement is shown, or attempted to be shown ; and no existing parol contract even can be gathered from the evidence produced.

Nor are we much better satisfied with the proof of a parol modification of the written contract. The rule is that such proof must be clear and satisfactory, and, as some of the cases say, free from doubt ; but, barring the question as to whether there was any agreement between the parties to exchange the twenty acres in section 1 for twenty acres in section 11, we are met with the further objection that there was no such part performance as would take the agreement out of the statute, and the objection seems a fatal one. The plaintiff relies upon his performance of the conditions of the written contract, that the defendant has platted one hundred and twenty acres, one hundred of which was included in the original contract. As to this reliance of plaintiff, how can the original consideration lend such aid to the parol contract as to be a part performance of it ? The parol contract stands alone, in this respect ; and, so far as this question is concerned, it is not unlike what it would be if defendant had performed the original contract, and the plaintiff sought to enforce the contract of exchange. It is the modification that must be partly performed or executed, to give it such life or power as to allow it to control a prior, existing written contract. The modification only has vitality by what has been done under it. No consideration has

been paid since the alleged modification; and, while the original consideration may feed the modified contract, it is impossible to see how prior acts can, by any system of reasoning, be held to be an execution or part performance of the subsequent contract of modification. But the platting of the twenty acres exchanged by defendant is claimed to be a part performance. Defendant claims this was done under his contract with the company. He so swears. There is no direct testimony on the part of plaintiff that it was done under the contract with plaintiff. No one could so swear but defendant. The only testimony is such as can be derived from the act of platting, and from defendant's own testimony. There is no reason apparent of record why the act of platting may not be as readily referable to the contract with the railroad company as to the contract with the plaintiff. Certainly, it cannot be so held by testimony clear and satisfactory. The supreme court in *Williams v. Morris*, 95 U. S. 457, says: "It is not enough that the act of part performance is evidence of some agreement; but it must be unequivocal and satisfactory evidence of the particular agreement charged in the bill or answer." See, also, *Phillips v. Thompson*, 1 Johns. Ch. 131; *Jones v. Peterman*, 3 Serg. & R. 543; 2 Story, Eq. Jur., § 762. If the case stood upon this error alone, we should be unwilling to say there was any evidence to warrant the court in concluding, as a question of law, that there was any such execution of the parol contract as would allow it to modify the prior contract in writing.

Again, we are unable to see how a decree for the specific performance of this contract can be entered under the pleadings and proofs now before the court. Courts cannot make contracts in attempting to enforce them. It can only enforce contracts made by the parties themselves. The decree in this case gives the plaintiff the half of a large number of blocks in the north-east one-fourth of section 11; whereas he was to have, under the contract sought to be enforced, alternate lots in that part of the plated land not taken by the railroad company. If this decree is rendered upon the theory that the railroad company has selected its forty acres under the contract so modified, as claimed by plaintiff, or upon the theory that the defendant has selected and appropriated the other twenty acres of this particular forty, we are un-

able to see why a specific performance under the evidence could not, with the same propriety, be enforced against any other part of the land claimed to be embraced within such modified contract. There is not a particle of testimony as to any agreement as to selection between the parties, nor as to any actual selection by either the railroad company or the defendant, unless the conveyance by the latter to the former be held to be such; and if it be so held, we are unable to see why such a conveyance can be deemed to be a selection or appropriation of land in section 11 more than in section 2. The conveyance was one and the same act. It conveyed the entire sixty acres by alternate half-blocks and acre tracts to the railroad company. It left the entire other half, or sixty acres, remaining to the defendant; and if the conveyance was a selection on the part of the railroad company in section 2, and the south forty in section 11, we are unable to see by what reasoning it was not as well a selection of the north forty in 11, or how the conveyance by the defendant of the north forty in 11 was any more a selection or appropriation by him under the alleged modified contract than his conveyance of the south forty in section 11, or that in section 2. It is in evidence that the land in section 11 was worth \$75 per lot, and the court finds this twenty acres to be worth \$24,000, while the evidence shows that in section 1 the land was worth but a very small amount. Certainly, the value of the land could not enter into the consideration of the court in determining that the contract should be enforced against this twenty acres alone. Specific performance is not invoked to punish parties for violation of contracts, but to prevent such violation. If the defendant is to be mulcted for damages for the violation of his contract, it must be done as damages for breach of such contract.

As to the objections urged in this court, that the contract is one which the courts will refuse to enforce on the grounds of public policy, the defendant not having made this an issue in the case, and the court below, of its own motion, not having seen fit to give it consideration, we content ourselves with reviewing the rulings and decisions made at the trial of the cause; venturing, however, the suggestion that the contract, as disclosed by the record, is not of the character which appeals strongly to the court of



equity to "strain its power to enforce a complete performance."

We are unable to see how, under any rule of law governing the specific performance of contracts, the decree can be sustained upon the pleadings and evidence now before this court.

The judgment must be reversed, and a new trial awarded; all the justices concurring, except McCONNELL, J., who, having been of counsel, did not sit in the case, and PALMER, J., who dissents.

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VAN DUSEN ET AL., Appellants, v. FRIDLEY, Respondent.

**Statutes — Construction—Counties — Creation.**

An act, chap. 38, L. 1885, creating a new county by the segregation of others, contained a provision that the act should not go into force unless "a majority of the legal voters of said Kidder county and of said range 69 shall vote in favor of said segregation," *held*, that a separate (not an aggregate) majority vote of the county and the range would be required in order to organize the county.

(Argued Feb. 14, 1889; affirmed Feb. 19; opinion filed Oct. 9, 1889.)

**A** PPEAL from the district court, Kidder county; Hon. RODERICK ROSE, Judge.

*Ball, Wallin & Smith*, for appellants.

The intention of the legislature was to submit the act to the approval of a certain body of voters interested in the measure. That is, to a single body of voters residing in different counties who were to vote upon the question in different voting precincts at the call and supervision of distinct boards of commissioners. Under the facts existing, and with reference to which the act was framed and must be construed, it was so worded that the vote provided for was to be taken, returned and canvassed under the existing election machinery centering at the county seats of the respective counties. In order to make the election machinery so located available, it became necessary to use apt words; hence we find frequent reference to the voters in Kidder county, and also to the voters in range 69 of Stutsman county; and likewise find appropriate language to convey the idea that these voters, who resided in localities territorially

distinct, should vote in their proper precincts, and return their votes to the proper county seat. It is obvious that the use of some such discriminating language was unavoidable in order to secure the objects in view and to use the separate election machinery which the act declared should be used. Yet it is from such language, necessarily employed to meet the circumstances of the case, that it is sought to have the court inject the idea of plurality, or majorities, into the law when there is not a word in the act conveying such a meaning. The words used import but a single majority, a majority of the voters to whom the act was submitted, residing in localities distinct from each other.

The question presented is, whether the court will insert between the word "and" and "of" in the second line of section 3 the words, "a majority." The effect of doing so is obvious. It exactly reverses the meaning of the words employed by the legislature. Thus changed, the act creating Stanton county could not become a law without double majorities. Courts will refuse to import words or ideas for the purpose of interpretation, when by so doing, the plain meaning of the law, as it is expressed, will be reversed. § 929, C. C.

It does not answer to say that after the words sought to be injected are actually introduced, a clear meaning will be expressed, for as between two meanings which may be equally clear a court will prefer that which can be obtained from the language actually employed, rather than one which is only reached by interpolations of either words not used, or ideas not expressed.

*Joseph W. Walker* and *W. F. Cochrane*, for respondent.

The question was to be submitted to two distinct classes of citizens. With this in view by giving to the word "also" its proper meaning we have that, that portion of Kidder county and the portion of Stutsman county, hereby proposed to be segregated, shall not be cut off unless the question of segregation shall be first submitted to a vote of the people of Kidder county, and IN LIKE MANNER, FURTHER, TOO and IN ADDITION to this, to the voters of that part of range 69 proposed to be detached from Stutsman county.

Without so rendering the language some of the words would

have no meaning. For instance, what could possibly be derived from the words, "and of said range 69," without first asking and answering the question: WHAT, of said range 69? When, in construing a sentence, a question must be mentally asked, in order that a meaning may be gathered, it is evident that there is an ellipsis, and that the words composing the correct answer to the question thus asked must be supplied. The words composing the answer, WHAT, of said range 69, must certainly be read between the conjunction "AND" and the preposition "OF," in order to avoid a meaningless absurdity. A correct answer to the question must not be given arbitrarily, it must be conveyed directly from the language used in the same sentence, and by means of unerring rules. There are two distinct things whose relation is shown by the preposition used; or as grammarians express it, two terms of relation — an antecedent and a subsequent term. In the language under consideration we find the subsequent term expressed, viz.: the words "said range 69" next following the preposition OF; but the antecedent term is omitted and must be supplied. Hence, whatever that antecedent term may be, it is manifest that the words necessary to express it must form the correct answer to our question, and must be the words to be supplied. To ascertain the missing term we have the rule that when two terms connected, refer jointly to a third, they must be adapted to it AND TO EACH OTHER, both in sense and in form. Brown, Inst. of English Grammar, p. 201.

Plainly then, the omitted words next preceding the preposition "OF" in the second term must be the same as the expressed words next preceding the preposition performing the same office in the first term, which are: "a majority of the legal voters." It will not suffice to cut off the words "a majority" and supply only the words "of the legal voters;" for then another ellipsis would occur, next preceding the preposition constituting the first of these words, whose antecedent term of relation would have to be supplied by mentally asking and answering the question: WHAT, of the legal voters? And our answer deduced according to the foregoing rules, would be: "a majority." Nor will it do to leave out the words "a majority of" and supply only the words

occurring between the two prepositions found in the first of said two connected terms, viz.: "the legal voters."

Had the intent of the lawmakers been as claimed, they would have simply omitted the repetition of the preposition "or" as it occurs next preceding its subsequent term of relation, "said range 69." Then these words and the words "said Kidder county" would have jointly formed the double subsequent term of relation to the preposition "or" occurring next preceding the words "said Kidder county;" and the antecedent term of relation to that preposition being already expressed, there would have been no ellipsis, and the sense of the language would have required but a "single," or "total," majority.

Were there any doubt as to the meaning of these material parts of the act it would be cleared up by considering the other parts. In the light of those provisions it is manifest the position of counsel is not tenable. At the outset, they are confronted with the question: why did not the act require that the elections should be held on the same day in both localities? The only limitation was, that each of the authorities named should call an election within sixty days. Again, each of the independent boards is made a canvassing board, there being no provision for any joint canvass. To uphold the theory of the other side we must admit that the law-makers contemplated the submission of the question of segregation to a vote of the people of one county, at a special election on one day, and then to the voters of another county, at a special election on another day, without reference to the result occurring at the first election. The legislators could not have intended such an absurdity.

Again, two distinct and essentially different questions were required to be submitted to the two bodies of voters. To the people of Kidder county the question of the DIVISION of their county, to the voters of that part of range 69 proposed to be detached from Stutsman county the question of the SEGREGATION of their territory from the county to which it belonged. The proposed division of Kidder county meant to her people the taking from them of one-third or more of their territory and source of revenue, and they alone were interested in it. They also had

the right to hold it for its just proportion of any liabilities that might have been incurred.

Here we believe we have the reason for the different phraseology in describing the two classes of voters. The one was aptly described as "the people of Kidder county," because there it was a question of LITERAL DIVISION of their county. The other, simply as "the voters of that part of range sixty-nine (69) proposed to be detached from Stutsman county," an apt description also; because that area formed but a small portion of Stutsman county and the question of CUTTING IT OFF was not one of such vital interest to the people of that county, yet, the voters residing there had certain rights to be considered.

TRIPP, C. J. This is an action brought by the plaintiffs to restrain the defendant, as treasurer of Kidder county, from selling their real property for taxes alleged to be illegal and void. The legislature of 1885 attempted to create the county of Stanton out of portions of the counties of Kidder and Stutsman. The new county so sought to be created took from the county of Kidder about one-third of its area, and from the county of Stutsman a part of range 69. By the terms of the act, the segregation of such territory from the two counties, and the creation of such new county of Stanton, was made to depend upon the vote of the people of Kidder county, and of that portion of Stutsman county sought to be included within the new county so created. A number of irregularities as to the assessment of the alleged illegal tax was set out in the complaint, and put in issue by the answer, but they were expressly waived at the hearing in the court below; and by stipulation of counsel the right of plaintiffs to maintain their action was made to depend solely upon the question whether the county of Stanton was ever legally created. If it was, then the defendant, as treasurer of Kidder county, would have no authority or jurisdiction to make sale of their lands in Stanton county; and if it was not, then it was conceded that, as the tax was legal, the defendant would have jurisdiction, and the complaint should be dismissed. The act, after giving the boundaries of the proposed new county, provides as follows: "§ 2. Provided, however, that a portion of Kidder county and a portion of Stutsman county, hereby

proposed to be segregated, shall not be cut off unless the question of segregation shall be first submitted to the vote of the people of Kidder county, and also to the voters of that part of range 69 proposed to be detached from Stutsman county, at a special election called for that purpose, by giving at least fifteen days' notice of the same by posting such notice in each election precinct as already established, or, if in such portion of either county proposed to be segregated no election precinct is already established, then it shall be the duty of the board of county commissioners, at their first meeting after the passage of this act, to appoint therein an election precinct; and it is hereby made the duty of the county commissioners of the counties of Kidder and Stutsman to call said election within sixty days after the passage and approval of this act, and, in case of the neglect or a refusal of said commissioners to call said election, then it shall be the duty of the county clerks of said counties to call said election. § 3. In case a majority of the legal voters of said Kidder county, and of said range 69, voting, shall vote in favor of said segregation, then this act shall be in full force and effect. It shall be the duty of the respective boards of county commissioners of Kidder and Stutsman counties to meet at their respective county seats within ten days after said election to canvass said vote, and, in case of refusal of said board to canvass said vote within ten days, then the respective county clerks are hereby authorized and empowered to appoint three freeholders of the county to act as a board of canvassers, who shall canvass the vote as now provided by law. The form of the ballot shall be: 'For division, Yes. For division, No.' All expenses of said election shall be paid by the county of Stanton.

It is the peculiar language of the sections above quoted that gives rise to the controversy in question. At the election held under this act there were cast in the county of Kidder 417 votes, of which 244 were for division, and 173 against; while in that portion of Stutsman county sought to be segregated the whole number of votes cast was 11, of which 5 were for division, and 6 against. And it is contended by the appellants that under the act, as they construed it, a majority of all the votes cast in both counties were in favor of division, and the county of Stanton was, therefore, legally created; while the respondent claims that under

the construction of the act, as contended for by him, it was required that a majority of each district named in the act must have voted affirmatively before the new county could become created; that is to say, that a majority of that part of Stutsman county sought to be segregated must have voted affirmatively, as well as a majority of Kidder county, before the act could take effect—in other words, that the act required a majority of each district affected thereby, and not a majority of both. This is the point of contention, and the question for the consideration of the court. Did the act contemplate that the majority for division and the creation of the new county should be a majority of all the votes in both Kidder county and that part of Stutsman county to be included within the new county, or a majority of the votes in each, separately comprised? The language of the act is peculiar. It provides that the new county shall not be created “unless the question of segregation shall be first submitted to a vote of the people of Kidder county, and also to the voters of that part of range 69 proposed to be detached from Stutsman county.” It does not provide that the question shall be submitted to the voters of Kidder county, and range 69, Stutsman county; but it provides that it shall be submitted to the voters of Kidder county, and also to the voters of range 69. “Also,” according to Webster, means: “In like manner; further; in addition to,” etc. So that, taken in the common acceptation of the word, the act required that the question should be submitted to the voters of Kidder county, and in like manner to the voters of range 69; or that the question should be submitted to the voters of Kidder county, and further, or in addition thereto, it should be submitted to the voters of range 69. This language clearly indicates two separate submissions and two separate majorities. And on an inspection of the whole act it must be held to contemplate separate and distinct submissions of the question. No one board or person submits the question, but it is submitted by separate boards or persons, to-wit: to the voters in Stutsman county it is submitted by the officers of that county, and to the voters of Kidder county by the proper officers of that county.

Nothing in the act requires the election to be held at the same hour of the day, or upon the same day, but, so far as any restric-



tions are found in the act itself, the question may have been submitted by the authorities of either county at entirely separate and distinct times.

The language of the third section is similar in its construction. It provides that "in case a majority of the legal voters of said Kidder county, and of said range 69, voting, shall vote in favor of said segregation, then this act shall be in full force and effect." The act can only be in force and effect upon the express condition that "a majority of the legal voters of Kidder county and of said range 69 shall vote in favor of said segregation." If the language of the act had been "a majority of the legal voters of Kidder county and said range 69," there would have been force in the contention of appellants that a majority of the voters in both districts, and not a majority in each, was intended; but the framers of the act have seen fit to insert the word "of" after the copulative "and," thereby making the concluding portion of the sentence elliptical and requiring some words to be supplied to make the sentence complete. What words are to be supplied? What words are connected by the preposition "of?" Or what words does it show relation between? The copulative "and" generally connects clauses of similar meaning and form of construction, dependent upon the principal sentence or clause; or, as laid down in the books, "where two terms connected refer jointly to a third, they must be adapted to it and to each other both in sense and form." Brown, Inst. 201. These clauses, "of said Kidder county," and "of said range 69," seem to conform to this rule. They are adapted to each other in form and sense, and are equally adapted to the principal clause, "majority of the legal voters;" and by this rule of construction the meaning would be that the act would be of force and effect only in case a majority in Kidder county and a majority in range 69 each voted in favor of the segregation, and the sentence would read: "In case a majority of the legal voters of said Kidder county and a majority of the legal voters of said range 69 shall vote," etc. In what other way can the ellipsis be supplied? By all rules of construction, it must be supplied by words which have already been expressed, and generally by those immediately preceding. In this case these are the only preceding words. They not only commence the sentence, but they are the

beginning of the section itself. It will not do to insert a part of the clause preceding — as, for instance, the words “legal voters,” —for that would make the clause to read, “a majority of the legal voters of said Kidder county and the legal voters of said range 69,” which would require all the legal voters of range 69 to vote affirmatively, and would place the appellants in a worse position than they now occupy. Nor would they be in any better position to supply before the words “legal voters” the word “of,” for the clause would still be elliptical, and we would be left to inquire what word or words were still to be supplied before it. The conclusion is irresistible that the entire clause, “majority of the legal voters,” must be supplied after and before the word “of,” making the sentence read as already given.

This construction is not only the sole one that can be given to the sentence, under the rules as laid down by the books, but it is one in entire harmony with the whole act, which must be taken together in the construction of particular sections. Not only is there no provision of the act providing that the election shall be held in the two counties at the same time, but the election in each county is separate and distinct, and the question submitted to the voters of the two counties affects them quite differently. It will be observed that the question of the formation of a new county is not submitted to the people who are to form the new county only. The two counties are differently affected by the segregation of territory. Kidder county by this act would lose nearly one-third of its entire area, while Stutsman county would lose but a few townships; and the legislature must have had this fact in mind when it provided that while the whole of Kidder county was permitted to vote on this question, yet in Stutsman county only that portion sought to be segregated was permitted to vote thereon. While, therefore, the voters in Stutsman only voted upon the question of segregation and the formation of a new county, the voters of that portion of Kidder county not to be included in the new county voted upon the question of a division of their county, with all its attendant results. To such voters the contemplated segregation meant a diminished territory and a diminished revenue. In voting upon this question they might well consider the injuries and benefits to be derived from such a

result in a manner quite different from those who were abandoning their former relations and entering into a new alliance. And not only did the questions submitted differ in character, and the persons to whom they were submitted differ in interest, but the persons and officers who determined the result of such submission were as different as the persons and officers who by law were required to submit them.

By the act the board of county commissioners of the respective counties was made the final judge of the result in each county, so that under this statute there were two questions submitted to two different classes of voters by two different classes of officers, and two different results were arrived at. Neither the board of commissioners of Kidder, nor the board of Stutsman, had power to declare more than the result of the vote in its own county; and, as no provision was made for a determination of the final result of the vote in both counties, it may well be argued that no such final result was contemplated by the act. Nor do we see anything in this construction unjust, or out of the usual course of former legislation in the territory. An examination of former acts attaching and segregating parts of counties shows a uniform precedent, by allowing the people so attached or segregated to be heard in determining their future relations; and, if the legislature in this case intended to adhere to precedent, it may well be doubted whether it could have intended to have allowed the small vote of the territory segregated from the county of Stutsman to become absorbed and overcome by the vote of the entire county of Kidder.

There is another consideration which must not be lost sight of in this case, and that is the view which has been taken of this law by the political department of the government. The record of this case shows that the action of the counties of Kidder and Stutsman, in ignoring the existence of the new county of Stanton, has been acquiesced in by all the people affected thereby, down to the time of the commencement of this action; and, while such determination is not binding upon the courts, yet they are slow to disturb such interpretation deliberately made by a co-ordinate department of the government, and will do so only in case of a clear departure from a plain construction of the act itself.

In any view of the case, we are constrained to hold that the act must be construed to require a majority of the legal voters in range 69; and also a majority of the legal voters in Kidder county, in favor of the new county, before it could have any legal existence; and that, such majority not being returned from said range 69, the act became of no force and effect; and that the real property in question remained and was subject to taxation in Kidder county. The judgment of the lower court dismissing the complaint is, therefore, affirmed; all the justices concurring, except ROSE, J., not sitting.

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DARTMOUTH SAVINGS BANK, Respondent, v. SCHOOL DISTRICTS  
6 AND 31, MINNEHAHA COUNTY, Appellants.

Schools and School Districts — Creation — Bonds — Validity — Estoppel.

By § 10, chap. 40, Pol. C., it was made the duty of the county superintendent of schools "to divide his county into school districts, sub-divide and rearrange the boundaries of the same, when petitioned by a majority of the citizens residing in the district or districts to be affected by such change." The records of the superintendent showed the formation of district 64 from parts of 6 and 31 and that it had afterward been dissolved and merged in the original districts. During its separate existence a number of its citizens met, elected officers and voted a tax. These officers afterward executed bonds for the purpose of erecting a school-house. In an action on these bonds against districts 6 and 31 as the successors of 64, on an issue of the legality of its organization, the defendants offered to prove that the superintendent had never been petitioned as required by law. The court refused to permit the proof. *Held*, error. *Held also*, that the defendants were not estopped to question the legality of the organization of district 64.

(Argued Oct. 2, 1888; reversed Oct. 13, 1888; opinion filed Oct. 9, 1889.)

APPEAL from district court, Minnehaha county; Hon. C. S. PALMER, Judge.

*Bailey & Davis*, for appellants.

The corporate existence of district 64 was in issue. It was incumbent on the plaintiff to establish that all requirements of the statute had been complied with. *Waterman, Cor.*, §§ 33, 38, 143, 144; *Bigelow v. Gregory*, 73 Ill. 197.

By the statute (§ 10, chap. 40, Pol. C.) under which these dis-

districts are organized the first requirement is a petition of a majority of the citizens residing in the districts to be affected. This is jurisdictional. Without it the superintendent cannot act. The petition is necessary to set in motion his powers. The burden was upon the plaintiff to establish all jurisdictional facts. *Jackson v. Trustees*, 8 Johns. 378; *Uteley v. Union Tool Co.*, 11 Gray, 139; *Mokelumne Hill Co. v. Woodbury*, 14 Cal. 424; *McGarrahan v. Mining Co.*, 96 U. S. 316, L. Ed. 24, 630; *Kaiser v. Lawrence*, 56 Ia. 104, 8 N. W. Rep. 772; *Norton v. Shelby County*, 118 U. S. 425; 14 Am. & E. C. C. 487; *Cooley, Tax*. 517.

If the district had no legal existence or legislative authority to issue the bond the plaintiff must fail. No recital could cure these defects, or preclude inquiry into the want of power even in the hands of innocent holders. *Anthony v. Jasper*, 101 U. S. 693, L. Ed. 25, 1005; *Wells v. Supervisors*, *supra*; *Northern National Bank v. Porter*, *supra*; *County v. Field*, 111 U. S. 83, L. Ed. 28, 360; *Merchants' National Bank v. Bergin*, 115 U. S. 384, L. Ed. 29, 430; 1 Dill. Mun. Cor., § 509.

The defendants were not parties to the bond, nor did they participate in the transactions out of which it arose. The plaintiff has no superior equities as a *bona fide* holder. In fact the equities are with the plaintiff as it can pursue the parties who made the ineffectual attempt to incorporate the district and set the bonds afloat. The defendants would be without remedy if it paid the bond. *Waterman, Cor.* 100, n.; *Kaiser v. Lawrence*, 56 Ia. 104, 8 N. W. Rep. 772; *Bigelow v. Gregory*, 73 Ill. 197.

We admit the legislature has power to alter or abolish a municipality and apportion its property and burdens as seems just. *Mount Pleasant v. Beckwith*, 100 U. S. 514, L. Ed. 25, 699.

But this does not imply that a portion of the inhabitants of two districts may organize under a general law into a *de facto* district, locate and build a school-house that neither of the other districts wants, incur a useless debt, dissolve and impose the burden on the old districts against their will. Again before this rule can be applied, a contract valid and binding in law must be established. The doctrine of estoppel, or of rights of *bona fide* holders afford no advantage.

*Wynn & Young*, for respondent.

“Every school district shall be deemed duly organized when the officers constituting the district board shall be elected and qualified.” L. 1879, p. 202, § 23.

As to the point of there being no evidence of any petition, we say that was one of the preliminary steps in forming the district. The evidence is that the district was formed. It organized and elected officers, levied taxes, issued bonds, built a school-house, assumed to act, and did act and exercise the powers of such a corporation. The presumption also is that the county superintendent proceeded lawfully to form the district. By his act and decision the district was formed, and was subsequently organized in the mode prescribed by statute. Any inquiry as to the regularity or irregularity of his proceedings is now immaterial. *Naragansett Bank v. Atlantic Silk Co.*, 3 Met. 287; *State v. School District*, 14 N. W. Rep. 382; *State v. School District*, 12 id. 812; *State v. School District*, id. 927. The defendants are also estopped to deny the legality of the organization. *Bigelow, Estoppel*, 463; *Wood's, Field, Law of Corp.*, §§ 349, 356; *Dooley v. Cheshire Glass Co.*, 15 Gray, 494; *Merrick v. R. E. & G. Co.*, 101 Mass. 385; *McCarty v. Lavasche*, 89 Ill. 270; *Ewing v. Robeson*, 15 Ind. 29; *Hills v. District Township*, 41 Ia. 494; *Angel & Ames, Corp.* 71, n.; *Herman, Estoppel*, 512.

The same rule applies to districts 6 and 31, as they are the successors, not only of the corporate powers, but the liabilities of 64.

The district had the power to issue the bond in question under the act of February 22, 1879, and the bond upon its face contained a recital of a performance of all acts necessary to be done in order that it might issue. This is conclusive as to the point made. *Burroughs, Pub. Sec.* 299; *Knox v. Aspinwall*, 21 How. 539, 62 L. Ed. 208; *Town v. Eaves*, 92 U. S. 484; *Marcy v. Township*, 92 U. S. 638; *Humboldt v. Long*, id. 642; *Hackett v. Ottawa*, 99 id. 86; *Commissioners v. Bolles*, 94 id. 104; *Commissioners v. Clark*, id. 278; *Commissioners v. January*, id. 202; *County v. Cromwell*, 96 id. 51; *City v. Mehaffy*, id. 312; *County v. Shores*, 97 id. 272; *City v. Rit-*

ter, id. 389; Larned v. City, 4 Wall. 275; Township v. Kernochan, 103 U. S. 562; Mercer v. Hackett, 1 Wall. 83; Grand Chute v. Winegar, 15 id. 355; City v. Butler, 14 id. 282; Demming v. Inhabitants, 18 Am. Rep. 253 and n.; 1 Dill. Mun. Corp. 506; Bigelow, Est. 467.

The district was a corporation *de jure* at the time the bond was issued. Even if there were defects in the preliminary organization, it became a district fully empowered to act by the decision of the superintendent in forming it, and by the election of its officers. The superintendent was, by the power given him to form districts, the sole judge of the sufficiency of the original petition and the preliminary steps. His decision was final, so far as the organization was concerned, and when the district officers were elected, then, by the express terms of the statute, the organization was deemed complete. While insisting on this we submit that it was clearly a corporation *de facto*, at the time of the issuance of the bond, and that its acts were, as to the public, and persons contracting with it, as valid as those of a corporation *de jure*, and not subject to collateral inquiry. People v. La Rue, 67 Cal. 526; Trumbo v. People, 75 Ill. 562; Leach v. People, 12 N. E. Rep. 726; State v. Carroll, 38 Conn. 449, 12 Am. Law Reg. (N. S.) 165; People v. Bangs, 24 Ill. 124; S. & L. G. R. Co. v. S. & C. R. R. Co., 45 Cal. 680; People v. Webber, 86 Ill. 283, 2 Dill. Mun. Corp. (3d ed.), § 892, n. 1; Wilcox v. Smith, 5 Wend. 231, 21 Am. Dec. 213; Burke v. Elliott, 4 Ired. L. 355, 42 Am. Dec. 142; O. & B. R. R. Co. v. Plumas Co., 37 Cal. 361; Hildroth v. McIntyre, 19 Am. Dec. 61, n.; B. & A. R. Co. v. Cary, 26 N. Y. 75.

TRIPP, C. J. This is an action to recover upon a bond and its interest coupons, alleged to have been issued by school district No. 64, Minnehaha county, Dak. The complaint, in substance, alleges that school district No. 64 was duly organized from portions of school districts Nos. 6 and 31 of said county; and that, as such corporation duly organized, it issued by its proper officers the bond in controversy, among others, to aid in the construction of a school-house for said school district No. 64, in accordance with the statute in such case made and provided; that plaintiff became and is now the owner and holder of such bond for value



before maturity ; that said district No. 64 has been dissolved, and that said defendant districts, 6 and 31, are the successors thereof. The principal defense set up and relied upon by the defendants is that said district 64 was never organized ; that it never had any legal existence ; and that the issue of said bond was without authority of law, and, therefore, illegal and void.

The issues were submitted to a referee, and the court, upon the report of the referee, made findings of fact and conclusions of law sustaining the organization of district 64, and rendered judgment for the plaintiff. Exceptions were duly taken to the findings and conclusions of law, and from the judgment so entered the defendants appeal to this court.

An inspection of the bill of exceptions and the record of the case shows that long prior to the execution and issue of the bond in controversy defendants were duly-organized school districts of Minnehaha county, numbered 6 and 31, respectively ; that on the 12th day of March, 1879, the superintendent of schools of the county of Minnehaha claimed to have formed school district 64 from a part of said districts 6 and 31 ; that subsequently a number of the citizens of said school district 64 met together and elected officers, voted taxes, etc.; that subsequently the officers so elected executed and issued the bond in question, with others, for the purpose of erecting a school-house in said district 64 ; that said school-house was subsequently erected with the proceeds of such bonds, and that subsequently to the issue of said bond, upon an appeal from the action of the county superintendent of schools to the board of county commissioners, as provided by statute, the proceedings of the superintendent of schools creating such school district 64 were reversed, and the territory carved out of districts 6 and 31 was again restored to them. It does not appear from the record which district, upon the dissolution of district No. 64, obtained the house erected with the proceeds of the bonds, or what, if any, use was ever made of it by such district.

The statute then in force as to organization of new districts by the county superintendent of schools provides as follows : " Districting the county. That it shall be the duty of the county superintendent of schools, in addition to other duties required of him, to divide his county into school districts, subdivide and re-

arrange the boundaries of the same, when petitioned by a majority of the citizens residing in the district or districts to be affected by said change, and to furnish the county commissioners of such county with a written description of the boundaries of each district, which description must be filed in the register of deeds' office before such district shall be entitled to proceed with its organization by the election of school district officers; and it shall be his duty to keep on file in his office all petitions and remonstrances, which shall show the date of reception and the action had thereon; and it shall be his further duty, on the division of or change of district boundaries, to notify the clerk of the districts interested of the change made." § 10, chap. 40, Pol. Code 1877.

The only evidence of the creation of school district No. 64 was an extract from a book kept by the county superintendent of schools, designated as the "Book of Records of the Formation of School Districts," which reads as follows: "School District No. 64. 1879, March 12.—Formed of sections S. E.  $\frac{1}{4}$  section 28, S.  $\frac{1}{2}$  of sections 26 & 27; all of sections 34 & 35; the east  $\frac{1}{2}$  of section 33, township 101, range 48. Not in separate existence. Is now merged in districts 6 & 31." The statute did not then require the keeping of such a record. There were also some entries in records of school districts 6 and 31, of similar character. No petition to the superintendent of schools, of citizens of the districts to be affected by the change, nor any written description of the boundaries of the districts filed in the register of deeds' office, was offered in evidence, and no parol or other evidence was offered, except as above stated, to prove that district 64 was ever created or organized, except in so far as the production of the bond and proof of its execution tended to do so, and the record of the district meeting at which the tax was voted and officers elected. On the other hand, after the plaintiff had rested its case, the defendants offered to prove that no such petition was ever in fact presented to the superintendent of schools, and this offer was rejected by the court and referee, but upon what ground the record does not disclose.

From an examination of section 10, *supra*, and other sections of the school law in force when the bond in controversy was

issued, it will be observed that the county superintendent of schools was vested with power to create and change the boundaries of school districts within his county in the manner and under the conditions prescribed by the statute. It was not intended by the legislature, nor can any interpretation of the statute be given, to allow him the arbitrary power of making and unmaking districts at will; and whatever may be the extent of his power or the effect of his decision in creating new districts from those already formed, and whether such power was merely ministerial or *quasi* judicial in character, it is clear that it could not be brought into exercise, except in the manner pointed out by the statute, and upon the happening of those events or the performance of those acts which gave him jurisdiction in the premises. Two things are specifically required to be done before the citizens of any proposed district can meet and organize: *First*, "a majority of the citizens residing in the district to be affected by the change must petition the county superintendent of schools;" and, *second*, "the county superintendent of schools must furnish the county commissioners with a written description of the boundaries of each district, which description must be filed in the register of deeds' office." And these requirements are not left for the courts to construe as mandatory, for the legislature has made them so by express enactment, saying they shall be done "before such district shall be entitled to proceed with its organization." Can it be said, in the face of such a statute, that the presentation of a petition and the furnishing and filing of a description of the school districts are merely directory, and that a failure to comply with such requirements is a mere irregularity? If there were no good reason for such legislation, its meaning could hardly be mistaken; and were the language of the statute doubtful, courts would be slow to give it a construction different from what its present language makes plain and unmistakable. It could never have been a supposed intention of the legislature that county superintendents of schools should make and unmake districts without regard to the wishes or will of those to be affected thereby. The petition of a majority of the citizens residing in the district to be affected by the change is the prerequisite to the exercise of his jurisdiction; and without expressing any opinion or intimation as to how far any action of his in

determining when such petition contains a majority, as required by the statute, or when such change shall or shall not be made, is or may be final, except in so far as it may be reversed on appeal by the board of county commissioners, we are clearly of the opinion that, in absence of such petition, his action is without jurisdiction, and is void. He is vested with power to act upon presentation of a petition, and not otherwise. As well might a justice of the peace or other tribunal render judgment against persons or property without issue of process. The making and presentation of the petition to him is a jurisdictional fact, which must be established when denied, and required to be proved, to give validity to the judgment or decision relied upon as ultimate proof of the matter in issue. The statute requires such petition to be filed in the office of the superintendent of schools, and he is required to enter thereon his action in the premises. In this case not only was no such petition offered in evidence, and no attempt made to account for its loss, if it ever existed, but, when the superintendent of schools is presented as a witness in the case, no question is attempted to be asked him as to whether in fact such petition was ever presented, or what, if any, action was taken thereon. These facts, coupled with the ruling of the court rejecting the defendants' offer to prove that no such petition was ever in fact presented, clearly show that the lower court deemed the statute directory, and that a failure to present such a petition would not affect the action of the superintendent in creating the district in question. This action of the court in refusing to allow the defendants to show that no petition was in fact ever presented to the superintendent of schools, was, in our judgment, clearly error, unless defendants are estopped from making such proof, which we shall discuss further on; and we shall not, therefore, inquire whether it was incumbent upon the plaintiff to prove such fact in the first instance, under the issues in this case; nor shall we examine the many other alleged errors complained of by defendants.

The question, as presented by the record, is, was this alleged school district 64, assuming to act through some of its citizens, without having performed the requirements of the statute, a legal corporation? The legislature may make and unmake municipal

corporations at will, having always a care not to disturb vested rights or impair the obligation of contracts. Subject to such restrictions, municipal governments may be said to be creatures of the statute; and, instead of creating them directly, as in case of municipal charters, the legislature may by general incorporation acts prescribe the manner in which districts or people may obtain corporate rights and assume corporate liabilities; but in doing so the legislature is not considered as delegating any of its legislative power, either to the people or to the person or officers who assisted in the incorporation. The law creates the corporation, and the performance of the conditions required qualifies the corporation to act. It is by the performance of the requirements of the statute that they are permitted to exercise the powers of municipal government. These are conditions precedent, and must be performed; and no power less than the legislature itself can dispense with their performance, or ratify an imperfect or incomplete incorporation. It is true, many of the provisions of general incorporation laws are mere matters of procedure, and are directory in character, but such requirements as are prescribed by the section under consideration are matters of substance, conditions material and precedent to incorporation, a failure to perform which will make subsequent facts illegal and void, except in so far as they may receive vitality or validity from estoppel or prescription. For the purposes of this case it must be presumed that the defendant could prove what he offered to prove, to-wit, that no petition was ever presented to the county superintendent of schools; and it must, therefore, be presumed that this condition precedent was not complied with; and it follows that, upon the case presented, school district No. 64 never was incorporated, and that the issue of the bond in question was without authority of law, and, therefore, illegal and void.

The plaintiff replies to this by saying that if the incorporation of school district No. 64 was illegal and void, having held itself out as a corporation, and having sold and disposed of its bonds to an innocent purchaser, defendant will be estopped from asserting such incapacity to contract, and that these defendants, as its successors, are so far privies in law as to estop them also from making such defense.

It is true that the rule of common law which held estoppel to be odious and to be looked upon with disfavor by the courts has to some extent been modified by the modern decisions; but we are aware of no case in which the doctrine of estoppel has been carried to the extent contended for here. The plaintiff asks not only that district No. 64 should be estopped from denying its incorporation, but that districts 6 and 31, which were in no manner privy to its assumed acts of incorporation, and one of which at least has in no manner received any benefit therefrom, if either can be said to have done so, shall also be estopped from making this defense.

The law which permits suits to be brought against all the successors of a corporation, where no provision is made for existing liabilities in the act or judgment of dissolution, is one of necessity, arising out of the provision of our constitution, which forbids legislatures from passing any law impairing the obligation of contracts; and the harshness of the rule is made evident in this case, where it is admitted that, while one only of these districts by virtue of the dissolution of district 64 becomes the owner of the house or property for which the proceeds of the bond were expended, the other one, in proportion to the extent of its territory, must equally, under the rule contended for, bear its proportion of the indebtedness incurred without its sanction, and perhaps without its knowledge. The doctrine by which privies who succeed to the benefits must also assume the consequent liabilities does not obtain here, nor is there any contract upon which such privity can be founded. None of the essential principles of estoppel apply to these defendants. They have not willfully or fraudulently done or omitted to do any act, relying upon which this plaintiff or its grantor has acted to its injury. Nor does the record disclose that they have ever counseled or become party to such act or omission; but for aught that appears in the record these districts defendant have continuously opposed the unwarranted and unlawful acts of the superintendent of schools, and a few self-constituted officers of this *pseudo* corporation; or, for aught that appears of record, they may have been wholly ignorant of the unlawful or fraudulent acts of such pretended officers. In either case, they would not have so held out the incorporation, or failed to deny



its existence, as to bring themselves within any principle of the doctrine of estoppel, if a public or *quasi* public corporation can ever be estopped from denying its incorporation. It is true, there are cases in which the rule is announced that, where the corporation has contracted as such, it shall be estopped to deny its incorporation ; but it is believed that upon an examination of the cases it will be found that they are all private corporations, and that, under the peculiar circumstances of each case, the law of estoppel could well be invoked. Such is the case of *Dooley v. Glass Co.*, 15 Gray, 490, relied upon by the defendant, in which, under the laws of that state, certain private persons, as required by statute, had filed a certificate over their own signatures, setting out the fact of their incorporation, which being offered and received in evidence, the defendants were held to be estopped to dispute the facts therein set forth. And this is as far, perhaps, as any case has gone, and is the one most frequently cited and relied upon for the doctrine here contended for. I have not had access to all the cases cited by text-writers in which it is claimed that the doctrine is maintained, but it is safe to assume that the facts of each case bring them within some of the well-recognized principles upon which the doctrine of estoppel is founded.

The general rule is that the defendant may always show that the contract was *ultra vires*; and, while the rule is subject to many exceptions and modifications as applied to the facts of given cases, yet, as applied to public and *quasi* public corporations, in which the party contracting has equal opportunities with the other to know its powers, it will be found that the exceptions are infrequent, and come clearly within the rules above given. It was thought for some time that the supreme court of the United States, by the rigid manner in which it upheld the contracts of municipalities in issuing bonds in aid of railroads and other works of internal improvement, had broken down the defense of *ultra vires* as applied to public corporations ; but the later decisions of that court explain the former cases, and limit the former language of the court to the facts of the case in which it was used, and the points therein determined. That court has now recently held that " the facts which a municipal corporation issuing bonds \* \* \* is not permitted to deny against a *bona fide* holder in face of the



recital in the bond are those connected with or growing out of the ordinary duties of such of its officers as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine before the bonds were issued." *Bank v. Porter Township*, 110 U. S. 608, 4 Sup. Ct. Rep. 254. And in *Hayes v. Holly Springs*, 114 U. S. 127, 5 Sup. Ct. Rep. 785, the court says: "Even a *bona fide* holder of a municipal bond is bound to show legislative authority in the issuing body to create the bond. Recitals on the face of the bond, or acts *in pais*, operating by way of estoppel, may cure irregularities in the execution of a statutory power, but they cannot create it."

Measured by this rule, estoppel could not create the power to execute the bond in question; no power but that given by the legislature could execute it. This same court has held over and over again that, "where there is a total want of authority to issue municipal bonds, there can be no *bona fide* holding of them." *Oakland v. Skinner*, 94 U. S. 255; *Ottawa v. Carey*, 108 id. 110, 2 Sup. Ct. Rep. 361; *Lewis v. Shreveport*, 108 U. S. 282, 2 Sup. Ct. Rep. 634. Says the supreme court of Indiana, which is cited by respondent as holding that where a corporation has received the full benefit of a contract it is estopped from setting up that it is *ultra vires*: "There is a broad difference between a private corporation organized for a private purpose, though subserving a public interest, and a public corporation, like a county or city, organized for public purposes only, and whose obligations must be paid from public funds, raised for public purposes only. The latter class of corporations may always defend on the ground that the supposed contract was outside of authority conferred on it by law." *Turnpike Co. v. Board*, 72 Ind. 226. And the same doctrine is laid down by Dillon on *Municipal Corporations*, § 381. See, also, *Mayor v. Ray*, 19 Wall. 468.

Where a private individual signs a paper or contract he may often be well estopped to say that he had no power so to do; whereas, if an agent or person assuming so to act had done so for him, he might well deny his authority. The government must always act through agents; and to say that the government or municipality shall not be permitted to deny the authority of some

self-constituted agent, who has assumed to act for it, would be to withhold from the public rights acknowledged to belong to private individuals. Again, on the grounds of public policy as well as for the reason that public corporations are open to all persons to be informed of their powers, the rule of estoppel is applied with less rigidity, and in cases of greater infrequency. Says the supreme court of the United States in *Whiteside v. U. S.*, 93 U. S. 257: "Although a private agent, acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment and injury of the public." See, also, *Mayor v. Eschbach*, 18 Md. 282; *Lee v. Monroe*, 7 Cranch, 376. Judge Story, in his work on Agency, § 307*a*, in distinguishing between public and private agents, says: "Indeed, this rule seems indispensable in order to guard the public against losses and injuries arising from the fraud or mistake or harshness and indiscretion of their agents. And there is no hardship in requiring from private persons dealing with public officers the duty of inquiry as to their real or apparent power and authority to bind the government."

Any other rule would open wide the door to fraud, and an adoption of the rule contended for by respondent in this case would put it in the power of corrupt and designing men to involve in debt, if not to bankrupt, whole classes of people. Three or more persons sufficient to fill the offices of a school district could conspire together, and elect officers of a proposed school district, and issue its bonds, and dispose of them to an innocent purchaser; and in case of suit brought, the district, its successors, or the tax payers thereof, though for the first time apprised of such indebtedness, would be estopped to deny the existence of such a corporation, because these self-constituted, but unauthorized persons have said by their acts it is a corporation. While the courts are disposed to protect the rights of innocent purchasers and to uphold commercial paper, the rights of a people will be much better protected, and the principles of commercial law sufficiently extended

by requiring all persons dealing with public officers and public corporations to inquire into their powers, and to see that they are authorized to enter into the contract they assume to make.

Again, while it is true that the rule has been somewhat modified which formerly required the pleader to allege and prove the incorporation of the defendant as well as that of the plaintiff, and that now in many of the states the general denial will not place such incorporation in issue, as is the case in our own territory by express enactment, yet, where the incorporation is made an express issue, as in the present case, the defendant should not be denied the privilege of maintaining its defense, unless in the opinion of the court some great wrong or injustice would be done the plaintiff thereby, especially where the defendant is a public corporation, and has in no manner, by pleading or otherwise, been apprised of such intention on the part of the plaintiff previous to the trial itself.

The plea of estoppel is largely in the discretion of the court, to be determined upon the facts of each case. It would hardly be urged to the court that the minor ought not to be heard to assert his minority, or the drunken man his intoxicated condition, simply because he contracted as an adult or as a sober man would contract. The law makes such contracts, when proven, voidable; the law makes such contracts as this absolutely void. Certainly what would not be tolerated in case of voidable contracts ought not to be urged with much force in case of void contracts.

Upon an examination of the cases in which the doctrine of estoppel is sought to be applied to public corporations, it will be found that in many of them the issue was sought to be raised collaterally, as in case of collection of taxes, and in resisting the acts of an officer by showing the illegality of his appointment, etc. The conclusions arrived at in such cases, or the reasons given therefor, are not applicable here, where, as we have seen, the issue is made directly by the answer itself.

A careful examination of the whole case satisfies us that this is not a proper one for the enforcement of the principles of estoppel, and that the court erred in not permitting the defendants to prove the failure of the citizens to present a petition of a majority of the citizens of the districts to be affected by the organization of

school district No. 64; and the judgment of the lower court is, therefore, reversed, and a new trial awarded. All the justices concur.

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**McGUIRE, Respondent, v. CITY OF RAPID CITY, Appellant.**

**1. Municipal Corporations — Powers — Local Improvements.**

Where a city had the power to drain, improve, keep in repair and prevent obstructions in its streets, *held*, it had the power to make a contract to straighten the course of a large stream of water running in a "zigzag direction" through the city.

**2. Same — Irregular Exercise of Power — Ratification.**

Where the contract of a city is not *ultra vires*, it is no defense in an action on it that it was irregularly made (not being by ordinance) where the city had received and retained the benefits derived from the contract.

**3. Contract — Performance — Sufficiency of Evidence.**

A contract provided that the work should be done in a good, substantial, workmanlike manner to the satisfaction of a certain engineer; *held*, that the engineer's certificate of satisfaction was sufficient to show performance and it was not necessary, in an action on the contract by the contractor; to go further and prove that the work had been done in the manner required.

**4. Same — Certificate — Form — Sufficiency.**

Where a contract provided that the work should be done to the satisfaction of a certain engineer evidenced by his certificate, and the engineer certified that the contractor "has completed his contract according to the specifications and is entitled to the full contract price for the balance thereof," *held*, the certificate was sufficient in form and showed that the work had been done to the satisfaction of the engineer.

CARLAND, J., dissenting.

(Argued May 12, 1888; affirmed May 25, 1888; opinion filed October 9, 1889.)

**A** PPEAL from the district court, Pennington county; Hon. CHAS. M. THOMAS, Judge.

*Chauncey L. Wood and W. E. Church, for appellant.*

The court erred in admitting in evidence the certificate of the engineer. *Butler v. Tucker*, 24 Wend. 447; *Smith v. Brady*, 17 N. Y. 173; *U. S. v. Robeson*, 9 Pet. 319; *Stewart v. Keteltas*, 36 N. Y. 388; *Wyckoff v. Myers*, 44 id. 143; *Bliss*, Code Pl., §§ 301-2; *Pom.*, §§ 517, 524, 554; *Johnson v. Moss*, 45 Cal. 515; 1 Gr. Ev., § 58; *Stone v. Knowlton*, 3 Wend. 374; *Snell v. Moses*, 1 Johns. 96; *Crawford v. Morrell*, 8 id. 253; *Saxton v.*

Johnston, 10 id. 418; Lowen v. Winters, 7 Cow. 263; Whittaker v. Smith, 4 Pick. 83; Alexander v. Harris, 4 Cr. 299; Barton v. Herman, 11 Abb. (N. S.) 382; Schenck v. Powell, 8 Abb. N. C. 42; Smith v. Briggs, 3 Denio, 73; D. & H. C. Co. v. Pa. Canal Co., 50 N. Y. 250; Tooker v. Arnoux, 76 id. 397; Story, Eq. Jur., § 1457.

The certificate was insufficient in its form under the terms of the contract. Stewart v. Keteltas, and Wyckoff v. Myers, and Smith v. Briggs, *supra*.

The contract was invalid: 1. Because no ordinance or resolution of the council for the making it was ever passed, recorded and published as required by the charter. 2. The subject-matter was beyond the powers conferred by the charter. Upon the first proposition, see sections 3, 7, 8, 9 and 13 of the charter, also Indianapolis v. Miller, 27 Ind. 394; City v. Evans, 35 id. 90; Steckert v. Saginaw, 22 Mich. 104; Morrison v. Lawrence, 98 Mass. 219; Terre Haute v. Lake, 43 Ind. 480.

The contract is *ultra vires*. A municipal corporation can exercise only those powers granted in express words; those necessarily implied in or incident to the powers expressly granted; those essential—not simply convenient, but indispensable—to the declared objects and purposes of the corporation. Dillon, §§ 89, 457, 953, 969; Green's Brice, p. 466; Cooley, Const. Lim., § 192; Clark v. DesMoines, 19 Ia. 200; Tredway v. Schnauber, 1 Dak. 236; Com. v. R. R. Co., 27 Pa. St. 339; Dunham v. Rochester, 5 Corr. 465; Harshman v. Knox Co., 122 U. S. 306; Thomas v. W. J. R. R. Co., 101 id. 101; Nashville v. Ray, 19 Wall. 468; McPherson v. Foster, 43 Ia. 48; Steckert v. Saginaw, *supra*; Zattman v. San Francisco, 20 Cal. 96; Herzo v. San Francisco, 33 id. 130; Terre Haute v. Lake, 43 Ind. 480; Head v. Prov. Ins. Co., 2 Cranch, 127.

It is insisted that as the contract has been executed and the city received the benefits it could not now refuse to pay for the work on the plea of *ultra vires*. It ought to be considered a complete answer to this that no presumption of benefit can arise from the performance of a contract which the council had no authority to make. There can be no ratification except by the party by whom and in the mode in which the act could have been author-

ized in the first instance. Civ. Code, §§ 1349, 1351; *Davies Co. v. Dickinson*, 117 U. S. 657; *Dillon*, §§ 385, 463; *McPherson v. Foster*, *supra*; *Thomas v. W. J. R. R. Co.*, *supra*; *Floyd's Acceptances*, 7 Wall. 666; *Herzo v. San Francisco*, *supra*; *Com'rs v. Van Dusan*, 40 Mich. 429; *Lewis v. Shreveport*, 108 U. S. 282; *Durango v. Pennington*, 7 Pic. 14; *Lyddy v. L. I. City*, 104 N. Y. 218.

In the nature of things there can be no estoppel on the corporation to set up the defense of *ultra vires*; *Dillon*, § 457; *St. Louis R. R. Co. v. Belleville*, 12 N. E. Rep. 680; *Nashville v. Ray*, *supra*; *Pettis v. Johnson*, *supra*.

The fact that an *ultra vires* contract has been executed can make no difference. *Whiteside v. U. S.*, 3 Otto, 247; *Hawkins v. U. S.*, 6 id. 691; *Story, Agency*, § 307; *Dill.*, § 381; *Driftwood Turnpike Co. v. Board*, 72 Ind. 226; *State v. Citizens S. R. Co.*, 47 Ind. 407; *Bank of Augusta v. Earle*, 13 Pet. 519; *Dartmouth College Case*, 4 Wheat. 656; *Marsh v. Fulton Bank*, 10 Wall. 676; *Oakland v. Skinner*, 94 U. S. 254; *Town of Bloomfield v. Charter Oak Bank*, 7 S. C. R. 865; *Delafield v. State of Ill.*, 26 Wend. 192; *S. C.*, 2 Hill, 174; *McDonald v. Mayor*, 68 N. Y. 23; *Dickinson v. Poughkeepsie*, 75 id. 74; *Smith v. Newburgh*, 77 id. 130; *Bissel v. Kankakee*, 64 Ill. 249; *Miller v. Goodwin*, 70 id. 663; *Cook v. McCrea*, 93 id. 238; *City of Champaign v. Harmon*, 98 id. 491; *Davis v. Old Col. R. R.*, 131 Mass. 258; *McCracken v. San Francisco*, 16 Cal. 623; *Daly v. San Francisco*, 13 Pac. Rep. 321; *Newberry v. Fox*, 33 N. W. Rep. 333; *Pearce v. Mad. R. R. Co.*, 21 How. 441; *Rogers v. Burlington*, 3 Wall. 654; *Ottawa v. Carey*, 108 U. S. 110; *Stichfield v. Ballou*, 114 id. 190; *Pa. R. R. Co. v. St. Louis R. R.*, 118 id. 290; *Bank of Toledo v. Porter*, 110 id. 608; *Donavan v. The Mayor*, 33 N. Y. 291.

Those cases in which municipal corporations have been held accountable for money or property received, are only apparent exceptions to the rule. Such accountability is based, not upon any recognition of validity in the contract, but upon express disaffirmance of such validity. It is because the city has received money or property which it had no right to contract for or receive, and, therefore, no right to retain, that it is bound to restore it. But

such accountability is limited to these two classes of cases. *Dillon*, § 460; *Com'rs v. Van Dusan*, *supra*; *Argenti v. San Francisco*, *supra*; *Thomas v. Port Hudson*, 27 Mich. 320; see, also, *Montgomery v. Plank Road Co.*, 31 Ala. 76; *Delafield v. State*, *supra*; *Oakland v. Skinner*, 94 U. S. 254; *Hawke v. Deffebach*, 115 id. 392.

*J. W. Fowler and Van Cise & Wilson*, for respondent.

The power to make the contract is given by section 7 of the charter. If the particular act for which the contract was made is not expressly stated in the powers given, it is surely implied, being germane to the general powers of the corporation. *Moore v. Mayor*, 73 N. Y. 246; *Chicago B. S. v. Crowell*, 65 Ill. 457; *West v. Menard Co.*, 82 id. 207; *Louisiana v. Wood*, 12 Otto, 294; *Torrent v. Muskegon (Mich.)*, 10 N. W. Rep. 132; *Coldwater v. Tucker*, 36 Mich. 478.

The city having entered into the contract with respondent, he having performed the work and the city received the benefit, it must pay for it. *Mahar v. Chicago*, 38 Ill. 273; *Hitchcock v. Galveston*, 96 U. S. 341; *Dillon, Mun. Corp.*, §§ 448, 457, 480; *State v. Citizens S. R. Co.*, 47 Ind. 407; *Pine Grove Tp. v. Talcott*, 19 Wall. 679; *County v. Amy*, 13 id. 297; *Marsh v. Fulton*, 10 id. 684; *Port Huron v. McCall*, 46 Mich. 574; *Moore v. Mayor*, 73 N. Y. 246; *Little Rock v. National Bank*, 98 U. S. 308; *Thomas v. Port Hudson*, 27 Mich. 322; *Ohio & M. R. R. Co. v. McCarthy*, 96 U. S. 258; *Union W. Co. v. Murphy F. Co.*, 22 Cal. 631; *Natoma W. M. Co. v. Clarkins*, 14 id. 552; *Chester G. Co. v. Dewey*, 16 Mass. 94; *Moss v. Lead M. Co.*, 5 Hill, 137; *Argenti v. San Francisco*, 16 Cal. 262.

The certificate of the engineer was properly admitted in evidence and binds the city. *Stewart v. Keteltas*, 36 N. Y. 392; *Wykoff v. Meyers*, 44 id. 145; *Chapman v. Lowell*, 4 Cush. 380; *Smith v. Kahill*, 17 Ill. 68; *City v. Hammond*, 4 Otto, 98.

TRIPP, C. J. This is an action brought by the plaintiff to recover a balance alleged to be due him from the defendant city for labor and expenses performed and incurred in changing the channel of Rapid creek, where it passes through said city, in accordance with an alleged contract made with the officers of said city.



Plaintiff alleges that by the terms of said contract he was to be paid the sum of \$8,500, of which \$5,000 only has been paid, leaving still due and unpaid the sum of \$3,500. The defendant alleges that the contract upon which the plaintiff seeks to recover was without the power of said city, and was illegal and void ; and that said city had no power or authority to enter into or make said contract in manner and form as set forth and claimed by the plaintiff. In other words, the defense claims (1) that the city, under its charter, had no power to make such contract; (2) if it had power to make such contract, it could only do so in the manner prescribed by its charter, and not in the manner in which it is claimed such contract was made. The case was tried by a jury, and a verdict directed for the plaintiff ; upon which, judgment being entered, the defendant appeals to this court.

The contract was in writing, signed by the plaintiff and the defendant, by its proper officers, and provided for the performance of the work "to the satisfaction of the city engineer," and for which the plaintiff was to be paid the sum of \$8,500 ; 75% of the value of the work done to be paid on the first day of each month, and the balance when the work was completed. The plaintiff, over defendant's objection, introduced in evidence the contract, plans, and specifications, also the certificate of the engineer as to the completion of the work, together with some oral testimony identifying and explaining the papers offered in evidence, and then rested. Defendant thereupon offered in evidence the city charter, and rested ; whereupon both parties moved the court to direct the verdict, and, the motion of the plaintiff being granted, the defendant brings the judgment entered thereon here for reversal, and relies upon the defenses made below, to-wit : (1) That the contract was *ultra vires* and void ; (2) that the defendant had no power to contract in manner as herein claimed ; and (3) that the certificate of the engineer was not evidence of performance of the contract sufficient to sustain the verdict.

The charter of Rapid City is a special one, granted by the legislature of the Territory of Dakota, and contains the grants of power usual in such enactments. Among such powers conferred, and through which it is contended the city obtained its authority, if at all, to make this contract, is the following : "To locate,

open, widen, extend, grade, pave, macadamize, bridge, curb, gutter, drain, improve, clean, and keep in repair all sidewalks, streets, avenues, and alleys in the city; to prevent obstructions, excavations, holes, and pit-falls in any of the same; and to require the owners or occupants of lots or buildings, at their own expense, to remove from all sidewalks, streets, avenues, and alleys opposite thereto snow, dirt, rubbish, and all other obstructions, including posts, signs, awnings, and all overhanging obstacles." City Charter, § 7, subd. 6. As will be observed, this section confers upon the city council very general and extensive powers in reference to the matters and things therein enumerated. It may "drain and improve" and keep in repair all "streets, avenues, and alleys," etc., and "prevent obstructions," etc., "therein." The section does not prescribe the manner of executing such powers, or attempt to limit the council in the exercise of its judgment and discretion in establishing drainage or making improvements; and it will, therefore, be restrained or controlled by the courts only where, under the circumstances as they are made to appear, it has exceeded the bounds of reasonable discretion. While the evidence brought to this court is very meager, it can be understood therefrom that the creek known as "Rapid Creek," before this contract, ran in an irregular manner through the lots, blocks, and streets of the city, and that the object of this new channel was to carry such stream in a direct line through the city, — for what precise purpose does not distinctly appear; but, as it was done by the authority of the city, in absence of any testimony to the contrary it must be presumed that it was done for the benefit of the public in draining or otherwise improving its streets, alleys, etc. It is true that in municipal contracts the power to make them must be proved, and not left to inference, and that all persons who deal with such corporations must see to it that the contract is one which the corporation has power to make; but it does appear in evidence that the subject-matter of the contract was water — surface water and running water — within the city limits; a creek flowing in a zigzag direction through a growing and populous city; a stream fed by mountain springs, and swollen at times by sudden rains and melting snows. Such a creek, at least so far as it interfered with or crossed the streets and alleys

of the city, was within the control and subject to the municipal power of the city. The city might not, perhaps, be authorized to divert it from the land and lots of those who might insist upon their rights as to the natural channel of the stream ; but it does not lie in defendant's mouth to urge such defense in behalf of those who have not sought to make it for themselves. It does not require much effort of the imagination to see that a straight, deep, and direct channel for such a stream would improve the streets, avenues and alleys of the city, though it might not be included within the proper term "drainage;" yet, where a city has such general powers as enumerated in this section, and conferred upon the city council, when exercised in such a manner as not to be in violation of the express terms of the charter, it would not seem too great an exercise of the usual presumption which attends public officers to infer that such powers were properly exercised. In absence of any testimony that the city council was entering into such a contract in fraud of public rights, or in the interest of private parties; that the drainage of the streets, avenues and alleys would not be benefited, or their condition thereby improved — we think there was enough shown to justify the court in holding their action to be a proper exercise of the charter powers, and in directing a verdict for the plaintiff. The contract, then, was not *ultra vires*. Sufficient is shown by the record to warrant the court in sustaining the contract as within the express powers granted by the terms of the charter.

Had the city power to contract in the manner set out in this case? The defendant contends that, by the terms of the charter, all such contracts must be made by ordinance passed and published as prescribed by the terms of the charter. We shall not take the time to examine the various provisions of the charter to ascertain and determine whether the defendant was or was not authorized to make the contract in the manner as herein set forth; for, if the defendant had power to make the contract, it cannot shield itself behind such a defense, and retain the benefits of the contract without tendering at least a reasonable compensation for the benefits received. The distinction is a broad one between a want of power and an irregular exercise of power. This has already been discussed by this court in *Tube-Works Co. v. City of Chamberlain*, 5 Dak.

54, 37 N. W. Rep. 761, and we content ourselves with the conclusion therein arrived at, which is decisive of this point again urged upon the attention of the court.

We pass to consider whether the court erred in holding the certificate of the engineer evidence of the completion of the contract sufficient to sustain the verdict. The contract provides that the plaintiff "shall perform the work in a good, workmanlike and substantial manner, to the satisfaction and under the direction of the city engineer of said city, to be testified by a writing or certificate under the hand of such city engineer." The certificate of the engineer offered in evidence is as follows: "To the Honorable City Council of the City of Rapid City — Gentleman : The contractor, M. McGuire, who has the contract for changing the channel of Rapid creek, has completed his contract according to the specifications, and is entitled to the full contract price for the balance thereof ; an estimate of five thousand (5,000) having been given heretofore, on or about the first day of April, 1886 ; the balance due being three thousand five hundred and fifty (3,550) dollars. M. WILLSIE, City Engineer."

The defendant contends that the certificate is not in form sufficient, under the contract, to be admissible in evidence ; and, if admissible at all, its only probative effect is to show a compliance with a condition precedent ; and that, notwithstanding the production of said certificate, it was still incumbent upon the plaintiff, by proof *aliunde*, to establish the fact of performance of the work in accordance with the contract. We do not so understand the contract. By its terms the plaintiff was to perform the work under the direction of the city engineer, and to his satisfaction. The city made the engineer its agent to approve and accept the work. His judgment was the judgment of the city, and the plaintiff was only required to perform the work in such a manner as to meet with his approval. It is true that the contract does provide that the work was to be done in a "good, workmanlike, and substantial manner ;" but whether it was so done or not was to be determined by the engineer himself. The plaintiff and defendant contracted that the work must pass the inspection of the defendant's engineer ; and though a court and jury, or other competent tribunal, might be satisfied that the work was done in a good workmanlike,

and substantial manner, yet it would not avail the plaintiff under this contract, unless, perhaps, the engineer should fraudulently or wrongfully withhold his approval. The city had yielded its judgment to the presumably more competent judgment of an officer skilled in work of this character. It bound itself to be governed by the judgment of such officer. It was a species of arbitration in advance; a convenient and proper method agreed upon between the parties to determine questions that would necessarily arise in the performance of the contract about which men might honestly differ. It was not a mere condition precedent, the performance of which had no other force and effect than to vex and annoy the contractor in obtaining the good opinion of a person whose certificate was merely ornamental in presenting his complete contract. This is not an unusual provision in such contracts, and it has been continuously upheld by the courts. It is not a delegation of power prohibited by charter, but it is an exercise of charter powers by proper and competent agents. The city cannot act as a whole or composite body, even in its corporate capacity. It can only act through agents; and, recognizing such fact, it may be deemed a wise provision of such a contract to leave the determination of the character of such work to a competent and skilled mechanic, rather than to the unskilled judgment of the members of its own body, or to subject the corporation to expensive litigation in obtaining the judgment of men perhaps less competent to determine such questions in the courts.

It is further contended that the certificate, to be admissible, and to have the probative effect contended for, must be in strict compliance with the contract. It is probable that the defendant might object to a certificate of its engineer which was not full and specific; and it is not impossible that the city would have been warranted in requiring the plaintiff to procure a certificate, in this case, that would have more closely conformed to the terms of the contract. But the city made no such objection. It chose to rest its defense upon the ground that the contract was *ultra vires*; not that it had not been performed in accordance with the contract. And, if the certificate is not sufficiently explicit, the city ought to be held to have waived such objection; for, had the objection been made as to the form of the certificate when presented, with-

out doubt the objection would have been obviated, and the plaintiff could readily have obtained a satisfactory certificate from the engineer. But in our judgment the certificate was sufficient. The very fact that the engineer gave a certificate at all was strong evidence in itself that the contract had been performed to his satisfaction. It is true that the certificate says "the contract has been performed according to the specifications." But the specifications were a part of the contract; and the language that follows, to-wit, that the plaintiff "is entitled to the full contract price for the balance thereof," contains the conclusion of the engineer that the work has been done in accordance with the terms of the contract, for not otherwise could he have made such certificate.

The contract in this case is very similar to that in general use; and, so far as we have been able to examine, the construction we have given it is the one uniformly given by the courts. In *Stewart v. Keteltas*, 36 N. Y. 388, the contract provided that the building should be finished "within the time aforesaid, in a good workmanlike and substantial manner, to the satisfaction and under the direction of the said architect, to be testified by a writing or certificate under the hand of the said architect." The certificate was: "This is to certify that Messrs. Stewart and Howell have completed the mason-work to your building in Leonard street. Yours," etc.,—and signed by the architect. It was objected that the certificate was not such as was provided by the contract, but the court held it a sufficient compliance. In *Wyckoff v. Meyers*, 44 N. Y. 143, the contract provided the same as in that of *Stewart v. Keteltas*, *supra*, and further provided that the last installment was to be paid "when all the work was completely finished and certified to that effect by the architect." The certificate stated: "This is to certify that the last payment of \$1,800 is due Wyckoff and Winham on your buildings, corner of Greenwich & Beach streets, as per contract," (signed by the architects.) At the trial it was objected that the certificate was not sufficient under the contract, and the defendant offered to show that the work was not done according to the contract; but the court held the certificate sufficient and conclusive, which ruling was sustained in the court of appeals. EARL, C., speaking for a unanimous court, says: "The last payment was not to be made until the plaintiffs ob-



tained the certificate of the architects to the effect that all work was completely finished. Both parties agreed to abide by the determination of the architects. \* \* \* There was no attempt to show that the certificate was not given in good faith ; and it concludes the rights of both parties." The court further says : " It is claimed, however, that the certificate is not in proper form because it does not in terms certify that ' the work was completely finished.' If there was no other answer to this, it would be a sufficient answer that the defendant did not place his objection to pay on this ground. He paid \$1,000 without any objection to the form of the certificate, and finally objected to paying any more because the work was not completed according to contract ;" and concludes by holding that the certificate did in effect certify that the work was completely finished. In *Omaha v. Hammond*, 94 U. S. 98, the contract provided that the work was " to be completed under the supervision and to the satisfaction of the chief engineer of the fire department." The plaintiff, in a suit against the city for pay for his work, proved by the report of such engineer that the work had been so completed ; and the supreme court of the United States, in sustaining the ruling of lower court denying the city the right to show that the work was not completed in accordance with the contract, says : " We think the city is concluded by the action of its own officer, the engineer, who was also, by the terms of the contract, authorized by the parties to it to decide these questions."

These cases seem to establish the rule that the certificate, when sufficient in form, is not only evidence of compliance with the condition precedent, but it is conclusive evidence of the facts therein contained ; and this, upon the theory that the question as to whether the work has been done in accordance with the contract is no longer an open question, but, by agreement of the parties, it is to be determined by the architect or person named in the contract itself. He alone, and not the court, is to determine that question. Therefore the only proof required or admissible under such a contract is the certificate itself ; unless, perhaps, where it has fraudulently or wrongfully been withheld, or where it is not sufficient in form, under the terms of the contract, and has been properly objected to for that reason. If it were incumbent upon



the party performing the work to prove, in addition to the certificate, that he had done so in accordance with the contract, clearly the other side would be permitted to prove that he had not done so if he could; and the conclusive character of the certificate would not only be destroyed, but the provisions of the contract requiring the work to be done to the satisfaction of the architect would become a mere idle form, without force or effect, except as a mere arbitrary condition to be enforced at the will of the second party. Such is not the view taken by the courts.

We think the verdict was rightly directed, and the judgment of the lower court is affirmed; all the justices concurring, except CARLAND, J., who dissents.

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GRAND FORKS NATIONAL BANK, Respondent, v. MINNEAPOLIS AND  
NORTHERN ELEVATOR COMPANY, Appellant.

**Chattel Mortgages — Validity — Crops — Registration — Notice.**

Under § 1704, C. C., § 4328, Comp. L., providing that "an agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing to the extent of such interest," a chattel mortgage given by one on crops to be grown on his land is valid, and when the instrument is properly witnessed and filed for record it is valid against creditors and subsequent purchasers of the mortgagor. It is not necessary that it should be refiled after the property comes into existence; it is sufficient if it was on file when their interest attached.

(Argued May 14, 1889; affirmed May 31; opinion filed October 9, 1889.)

**A** PPEAL from district court, Grand Forks county; Hon. CHAS.  
F. TEMPLETON, Judge.

*Cochrane & Fisk*, for appellant.

Under our Code a mortgage cannot be given upon property not in existence. Comp. L., §§ 4303, 4351, 4356, 2675, 2676, 4346, 3229, 3606, 3242, 3611. These sections are but an epitome of the common law, and it is there well settled that such property cannot be sold or mortgaged. *Cole v. Kerr*, 26 N. W. Rep. 598; *Lamson v. Moffett*, 21 id. 62, 61 Wis. 153; *Long v. Hines*, 16 Pac. Rep. 339; *Chapman v. Weimer*, 4 Ohio St. 481; *Whittel-*

shoffler v. Strauss, 3 South. Rep. 524; Redd v. Burris, 58 Ga. 574, 15 Cen. Law. Jr. 233; Hutchinson v. Ford, 15 Am. Rep. 711; Farrar v. Smith, 64 Me. 77; Pettis v. Kellogg, 7 Cush. 456; Comstock v. Scales, 7 Wis. 138, 159; Chenoweth v. Tenny, 10 id. 341, 397; Farmers' L. & T. Co. v. Commercial Bank, 11 id. 207, 215; Loth v. Carty, 4 S. W. Rep. 314; Single v. Phelps, 20 Wis. 398, 419; Mowry v. White, 21 id. 417, 422; Hunter v. Bosworth, 43 id. 591; Low v. Pew, 11 Am. Rep. 357, 108 Mass. 347; Williams v. Briggs, 16 Alb. Law Jr. 387, 23 Am. Rep. 518; Jones v. Richardson, 10 Met. 481; Moody v. Wright, 13 id. 17, 46 Am. Dec. 706; Barnard v. Eaton, 2 Cush. 294; Chesly v. Joslyn, 7 Gray, 489; Milliman v. Naher, 20 Barb. 37; 23 Ill. 320; Long v. Hines, 19 Pac. Rep. 796; 10 Gray, 568; 8 Barb. 102; Duchess of Kingston's Case, 2 Smith L. C. 705; Looker v. Peckwell, 38 N. J. L. 253; Farmers' L. & T. Co. v. Long Branch Imp. Co., 27 Hun, 89; 3 Amer. & Eng. Enc. Law, 184.

Respondent will insist that the mortgage may be construed as a contract for a future lien, and that it is good under section 4328. This is merely the old equity rule which recognizes a contract for a future lien and enforces it between the parties. *Beal v. White*, 94 U. S. 382; *McCaffery v. Woodin*, 65 N. Y. 459; 1 Chitty, Cont. 528-530; Benjamin, Sales, §§ 78, 84; *Long v. Hines*, 19 Pac. Rep. 796.

Assuming it to be a contract for a future lien and binding between the parties, still no cause of action is stated. The law does not declare the filing of a contract for a future lien to be notice as against subsequent purchasers in good faith for value. There is no allegation that the appellant had any notice of respondent's claim. *Barrett v. Fisch*, 41 N. W. Rep. 310.

The complaint does not show that the contract for a future lien was ever carried into effect, so as to render it operative as a mortgage. 1 Schouler, Per. Property, § 421; *Long v. Hines*, 19 Pac. Rep. 796; *Barrett v. Fisch*, *supra*; Wade, Notice (2d ed.), §§ 119, 122; *Mesick v. Sunderland*, 6 Cal. 297; *James v. Morey*, 2 Cow. 246; *Parret v. Shaubhut*, 5 Minn. 323; *Washburn v. Burnham*, 63 N. Y. 301; *Betzer v. Rankin*, 77 Ill. 289; *Graves v. Graves*, 6 Gray, 391; *Galpin v. Abbott*, 6 Mich. 17; 4 Wait's

A. & D. 588; *Frost v. Buckman*, 1 Johns. Ch. 288; *Smith v. Lawrence*, 12 Mich. 431; *Newell v. McLarney*, 49 id. 232, 13 N. W. Rep. 529; *Bassinger v. Spangler*, 10 Pac. Rep. 810; *Nicklin v. Nelson*, 5 Pac. Rep. 51.

A mortgage is defined by our statute, and the form is prescribed by section 4372, contemplating the mortgage contract as executed. A contract for a future lien under section 4328 is by its terms executory, and there is as much difference between a mortgage and a contract for a future lien as between a sale and a contract for a sale. The differences have been defined; section 3607, as to a contract for a future sale, is a counterpart of section 4328, as to a contract for a future lien. And as the consummation of a contract for a future sale is only reached by the delivery of the property contracted to be sold, so is a contract for a future lien executed only by the delivery of the property when it comes into existence. *Brown v. Pierce*, *supra*; *Lanfear v. Sumner*, 17 Mass. 110; *Long v. Hines*, 19 Pac. Rep. 796.

It appears then there are two kinds of contracts, mortgages and contracts for future liens. As to mortgages it provides that the filing of them should be notice of their contents. As to contracts for future liens, that they are valid between the parties, but that when the property upon which it is given comes into existence, the contractee should reduce it to possession, else he is deemed to have waived the benefit as against subsequent purchasers. §§ 4379, 4380, 4657.

The respondent having had the privilege under this contract for a future lien to take possession of the property, or file his contract after the property came into existence, and having failed to either take possession or re-file the mortgage, the license should be deemed revoked so far as it concerns the interest of this defendant. §§ 4379, 4380; *Jones*, Chat. Mort., §§ 161, 164; *Chase v. Denny*, 130 Mass. 566; *Moody v. Wright*, 13 Met. 17, 46 Am. Dec. 706; *Cole v. Kerr*, 26 N. W. Rep. 599, 19 Neb. 553; *Getting v. Nelson*, 68 Ill. 591; *Wood v. Leadbetter*, 13 M. & W. 838; *Blanchard v. Cook*, 13 N. E. Rep. 91; *Lamson v. Moffat*, 21 N. W. Rep. 62, 61 Wis. 153; *Comstock v. Scales*, 7 id. 159; *Chynoweth v. Tenney*, 10 id. 397; *Single v. Phelps*, 20 id. 399; *Farmers' L. & T. Co. v. Commercial Bank*, 11 id. 207; *Mowry*

v. White, 21 id. 417; Farmers' L. & T. Co. v. Fisher, 17 id. 114; Hunter v. Bosworth, 43 id. 583; Farmers' L. & T. Co. v. Cary, 13 id. 110; Jones v. Richardson, 10 Metc. 481; Chesly v. Joslyn, 7 Gray, 490; 1 Parsons, Contract, § 525; Long v. Hines, *supra*; Seidenbach v. Riley, 19 N. E. Rep. 275; 3 Am. & Eng. Ency. Law, 185; Cook v. Cathrell, 11 R. I. 482, 23 Am. Rep. 518; Williams v. Briggs, 11 R. I. 476, 23 Am. Rep. 518, 22 id. 653, n.; Walkly v. Vaugh, 33 Conn. 577; Gregg v. Sanford, 24 Ill. 17; Chopen v. Cram, 40 Me. 561; Codman v. Freeman, 3 Cush. 306; Marks v. Robinson, 2 So. Rep. 292; Chase v. Denny, 130 Mass. 566; Mitchell v. Black, 6 Gray, 100; Griffith v. Douglas, 73 Me. 532, 40 Am. Rep. 395; Milliman v. Neher, 20 Barb. 37; Hutchinson v. Ford, 9 Bush, 318, 15 Am. Rep. 711; Roy v. Goings, 6 Bradw. 162; Barnard v. Eaton, 2 Cush. 294; Black v. Webb, 20 Ohio, 304.

The filing of this contract was no notice because the property was not in existence at the time the mortgage was made and filed. Jones v. Richardson, 10 Met. 463, 481; Jones, Chat. Mort. 157; Polk v. Foster, 7 Baxt. 100; Tedford v. Wilson, 3 Head, 311; Griffith v. Douglas, *supra*; Long v. Hines, *supra*; Single v. Phelps, *supra*; Chapman v. Weimer, 4 Ohio St. 481; Cudworth v. Scott, 41 N. H. 456; Cressey v. Sabre, 17 Hun, 120; Halstead v. Bank, 4 Marsh. 554; Doswell v. Buchanan, 3 Leigh, 365, 23 Am. Dec. 281; Hutchinson v. Ford, 15 Am. Rep. 711; Wade, Notice, § 214; Buckingham v. Hanna, 2 Ohio St. 555; Loan & Trust Co. v. Maltby, 8 Paige, 361; Jackson v. Town, 4 Cow. 598; Faircloth v. Jordan, 18 Ga. 350; Calder v. Chapman, 52 Pa. St. 359, 91 Am. Dec. 163, 164; Hetzel v. Barber, 69 N. Y. 1.

The respondent obtained, at best, but an equitable title to the property after it came into existence, and the appellant having purchased and obtained possession of it, the legal title is in defendant and the equitable title of plaintiff cannot prevail over this legal title. Wells, Replevin, §§ 129, 105; Barrett v. Fisch, 41 N. W. Rep. 310; Whitcomb v. Hungerford, 42 Barb. 177; Hayland v. Budget, 35 Cal. 404; Marks v. Robinson, 2 So. Rep. 296; Wetzler v. Kelly, 3 id. 747; Mayer v. Taylor, 69 Ala. 403, 44 Am. Rep. 522; 4 Am. & Eng. Enc. Law, 903; 1 Smith Lead. C. 891\*; Lanfear v. Sumner, 17 Mass. 110, 9 Am. Dec. 119; Lamb v. Du-

rant, 12 Mass. 54, 7 Am. Dec. 31; Thorndike v. Bath, 114 Mass. 118; Parsons v. Dickinson, 11 Pick. 352; Veazie v. Somerly, 5 Allen, 280; Brown v. Pierce, 97 Mass. 46, 93 Am. Dec. 57.

*McLaughlin & Noyes*, for respondent.

There is a conflict in the authorities as to such a mortgage as this; but under our Code "any interests in property which is capable of being transferred may be mortgaged." § 4351. "Property of any kind may be transferred, except as otherwise provided by this article." § 3224. "A mere possibility, not coupled with an interest, cannot be transferred." § 3225.

In other words, "a mere possibility, *coupled* with an interest, may be transferred." Did the mortgagor have a possibility, coupled with an interest? He certainly did. The complaint alleges that he was the owner, and in possession of this farming land. He then, necessarily, had an interest in the crops to be raised upon the land. The "possibility" was the power of the soil to produce the crop under any contingency; and the interest was vested by his ownership and possession of the land. He was then in position to execute this mortgage. § 4356, Comp. L.; Jones, Chat. Mort., §§ 140, 151; 1 Pars. Contracts, 523; Story, Sales, §§ 185, 186; Hearst v. Bell, 72 Ala. 340; Wittleshoffer v. Cross, 3 So. Rep. 534; Acques v. Wasson, 51 Cal. 620; Scharfenburg v. Bishop, 35 Ia. 60; Brown v. Allen, id. 305; Wheeler v. Becker, 68 id. 723, 28 N. W. Rep. 40; Norris v. Hicks, 38 N. W. Rep. 395; Oil Company v. McGinnis, 20 N. W. Rep. 85; Miller v. Chappel, 29 id. 52; Sanborne v. Benedict, 78 Ill. 309; Van Hooser v. Cory, 34 Barb. 9; 41 id. 404; White v. Thomas, 52 Miss. 49; Cook v. Steele, 42 Texas, 53; Smith v. Beatty, 31 N. Y. 542; McCaffrey v. Woodin, 65 id. 459; Apperson v. Moore (Ark.), 21 Am. Rep. 170; Smith v. Atkins, 18 Vt. 465; Rollins v. Hearst, 90 N. C. 270; Wyatt v. Watkins (Tenn.), 16 Alb. L. J. 205; Everman v. Robb, 52 Miss. 653; Headrick v. Brattain, 63 Ind. 438; Pennock v. Coe, 23 How. 117; 16 Law. Ed. 436; Butt v. Ellet, 19 Wall. 544; 22 Law. Ed. 183.

The registration of a mortgage upon an unplanted crop in the

proper office is notice, and an averment of such registration is equivalent to an averment of notice. *Wittleschoffer v. Strauss*, 3 So. Rep. 524; *Smith v. Fields*, 79 Ala. 335; *Miller v. Chappel*, 29 N. W. Rep. 52; *Wheeler v. Becker*, 28 id. 40; *Wyatt v. Watkins*, 16 Alb. L. J. 205; *Hurst v. Bell*, 72 Ala. 340; *Duke v. Strickland*, 43 Ind. 494.

It is not claimed the chattel mortgage should be construed as a contract for a future lien. It is what it purports to be: a chattel mortgage upon property existing in potentiality; that its subject was a possibility coupled with an interest in the mortgagor, and as such, was the subject of a valid mortgage under section 3225, C. C.

TRIPP, C. J. This is an action of conversion brought by the Grand Forks National Bank to recover of the Minneapolis & Northern Elevator Company the value of about one thousand bushels of wheat, alleged to have been purchased by the defendant of one Rogers, the mortgagor of this plaintiff. The complaint, in substance, alleges, after setting out the incorporation of plaintiff and defendant, that the said Rogers, on the 4th day of March, 1887, being indebted to the plaintiff in the sum of \$240, at the county of Grand Forks, in said territory, made, executed, and delivered to the said plaintiff, his, the said Rogers', promissory note for the said sum of \$240, with 12% interest thereon, payable November 1, 1887, and that, to secure the payment of such amount, at the said time and place, he made, executed, and delivered to the said plaintiff his chattel mortgage upon certain personal property, consisting of several horses herein particularly described, and also upon certain crops to be grown upon the land of said Rogers, and described in said mortgage as follows: "All the crops of every name, nature, and description which have been or may be sown, grown, planted, cultivated, or harvested during the years A. D. 1887 and 1888, and until said debt is fully paid, on the following described real estate, to-wit: The north-west quarter of section 17, and the south-east quarter of section 17, township 149, range 51,"—which mortgage was filed with the register of deeds of said Grand Forks county, March 5, 1887, and is set out in full as an exhibit, and made a part of the complaint, no part of which mortgage debt has been paid.

The complaint further alleges the growing and harvesting a large amount of wheat on the said lands during the year 1887, and the sale to this defendant of one thousand bushels thereof on the 15th day of September, 1887, and demands judgment for the value of the wheat so received and sold by the defendant.

The defendant demurred to the complaint, and the demurrer having been overruled by the court, and the defendant having elected to stand upon his demurrer, final judgment was entered for the amount due the plaintiff on the note and mortgage, from which judgment the defendant appealed to this court.

It is conceded by the parties that the crop of wheat sought to be mortgaged had not been sown at the time of the making or the filing of the chattel mortgage in question; and it is further conceded that the defendant had no other or further notice of plaintiff's claim to the property than that conveyed by the filing of the mortgage on March 5, 1887; so that the simple question presented to the court is, was this mortgage upon crops to be grown upon the land of the mortgagor, made and filed prior to the planting thereof but remaining on file thereafter, valid, as against this defendant, without actual notice to him of the existence of said mortgage?

The proposition is susceptible of division into two parts: *First*, was such a mortgage valid between the parties? *Second*, was it valid as against this defendant, or, in other words, did the record of such a mortgage impart notice to him? At common law the mortgage conveyed the title; and, as a mere expectancy or property not *in esse* could not be conveyed, it could not be mortgaged, and the mortgage of goods not then owned by the mortgagor was held not to cover such property, though subsequently acquired by him. *Jones v. Richardson*, 10 Metc. 481; *Otis v. Sill*, 8 Barb. 102. This rule of the common law, which is still adhered to, became subject to many exceptions, and, on the theory of potential existence, the chattel mortgage became extended to a large class of cases in which the property had no actual or certain future existence,—such as the wool to be grown from certain sheep, the butter to be manufactured from the milk of certain cows, the grain to be harvested from growing crops, and even, in some cases, the crops to be sown and harvested on certain described



lands. *Van Hoozer v. Cory*, 34 Barb. 9, 12; *Conderman v. Smith*, 41 id. 404; *Arques v. Wasson*, 51 Cal. 620; *Robinson v. Ezzell*, 72 N. C. 231; *McCaffrey v. Woodin*, 65 N. Y. 459.

These cases proceeded upon the theory that a person having a present ownership of the means of producing was the owner of the future product. Much skill and learning is displayed in the decisions of the courts in determining whether the facts of the given case bring it within the rule. Many other exceptions grew up in which the strictness of the common-law rule became much modified; and, as the chattel mortgage came more and more into use in the commercial world by force of statutes and modern decisions of the courts, the harshness of the rule has greatly disappeared. The maxim of Lord Bacon, that "although a disposition of after-acquired property is altogether inoperative, yet such disposition may be considered as a declaration precedent, which derives its effect from some new act of the party after the property is acquired," has been applied by the courts in its fullest effect to mortgages at law. Courts of law have been disposed to treat such mortgages as declarations in regard to future interests, and valid as such between the parties. The earlier cases required some affirmative act on the part of the person to be affected thereby after the happening of the event upon which the contract was based, and generally such new act to ratify the original contract must have been in furtherance of it, and with an apparent intention that the original agreement should be treated as then in force. *Jones v. Richardson*, 10 Metc. 481; *Head v. Goodwin*, 37 Me. 181. Later, the courts were inclined to allow that the declaration of the mortgage, permitting the mortgagee to take possession of the property upon condition broken, could be enforced without any assent of the mortgagor after default, and that upon possession so taken by the mortgagee the lien of the mortgage attached, and the contract became valid as one of pledge. This doctrine proceeded upon the theory that the agreement contained in the mortgage was a continuing one until it was canceled or revoked by the mortgagor, and that the mortgagee, acting lawfully under such license, obtained a valid lien as pledgee as soon as he reduced the property to possession; and some of the cases have gone so far as to intimate that such power may be irrevocable. *Wood v.*

Leadbitter, 13 Mees. & W. 838; Wood v. Manley, 11 Adol. & E. 34; McCaffrey v. Woodin, 65 N. Y. 459.

In equity, however, a different rule has always obtained from the one at law. The title to the mortgaged property never passed to the mortgagee, but the interest of the mortgagee was considered as a mere lien — an equitable interest — which would prevail over creditors and subsequent claimants, although the mortgagee had done no act to reduce the property to possession, and though he had done no new act to perfect the lien after the property had been acquired or came into existence; the theory of this doctrine being that the mortgage upon future property is a continuing agreement, which attaches to the property immediately upon its coming into existence, and adheres to it for the benefit of the mortgagee, in accordance with the familiar principle that “equity considers that done which ought to be done.” This equitable doctrine as to mortgages comes to us from the civil law, which declares: “Not only goods in present possession, but even goods in reversion, are comprehended under a general pawn or *hypothèque* — as grain in the ground, a ship to be built, with the timber pledged—if there be a clause inserted to comprehend it. An *hypothèque* may be an assurance of a thing to be delivered hereafter.” Dom. Civil Law, bk. 3, tit. 1, § 1; Ayl. Pand. bk. 4, tit. 18. The doctrine was early adopted by our American courts. In *Mitchell v. Winslow*, 2 Story, 644, Judge STORY says: “It seems to me a clear result of all the authorities that wherever the parties, by their contract, intend to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor or not, or if personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires title thereto against the latter, and all persons asserting a claim thereto under him, either voluntarily or with notice, or in bankruptcy.” In that case a mortgage of all the tools and machinery in a cutler’s shop, together with all that might be manufactured or purchased within four years, was held to be a good, equitable, lien, and protected as such under the bankrupt act; and while this case has been criticised by the supreme court of Massachusetts (*Moody v. Wright*, 13 Metc. 17, 30), and some others of

the states have declined to follow it (*Barnard v. Eaton*, 2 Cush. 294; *Hunter v. Bosworth*, 43 Wis. 583; *Chynoweth v. Tenney*, 10 id. 397), yet it may be said to be at the present time the generally established American doctrine. *Beall v. White*, 94 U. S. 382; *Butt v. Ellett*, 19 Wall. 544; *Pennock v. Coe*, 23 How. 117; *Brett v. Carter*, 2 Low. 458; *Apperson v. Moore*, 30 Ark. 56; *Schuelenburg v. Martin*, 2 Fed. Rep. 747; *Robinson v. Mauldin*, 11 Ala. 977; *Floyd v. Morrow*, 26 id. 353; *Gregg v. Sanford*, 24 Ill. 17; *Scharfenburg v. Bishop*, 35 Ia. 60; *Phelps v. Murray*, 2 Tenn. Ch. 746; *Cook v. Corthell*, 11 R. I. 482; *Ellett v. Butt*, 1 Woods, 214.

This doctrine, announced by Judge STORY in *Mitchell v. Winslow*, *supra*, was reviewed and affirmed in the leading case of *Holroyd v. Marshall*, 10 H. L. Cas. 191, which arose upon a mortgage of certain machinery and implements described in the schedule, and all other machinery and implements which should, during the continuance of the security, be placed on the premises described in the mortgage in addition to, or in substitution for, those enumerated in the schedule. The proceeding was in equity, against a judgment creditor who had levied on the after-acquired property. In the lower court Lord CAMPBELL held that, as the mortgagee had done no act to reduce the property to possession after it had been acquired, and prior to the levy, the equity of the mortgagee must give way to the legal rights of the creditor; but the decision of the lower court was reversed in the house of lords, and the doctrine announced by Judge STORY fifteen years before was affirmed by the English court in a decision which has ever since been regarded as settling the law on that subject.

The equity rule in regard to mortgages was adopted by the codifiers, and has been embodied in our statute. The mortgage no longer conveys title to property either real or personal, but is a mere lien thereon (§§ 4330, 4331, Comp. Laws); and, by provision of section 4328, Comp. Laws, "an agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing to the extent of such interest." By this section not only is an agreement to

create a lien upon property not yet in existence valid, but the lien contracted for attaches the moment that the interests of the party himself attach. There is no *interim* of time for hostile interests to intervene. There is no delay provided for within which the tenor is required to obtain a new or more formal instrument or contract of lien, or within which he must obtain from the other party a ratification of the original agreement, or reduce the property to actual possession under the contract already made. Under this statute the original contract, *ipso facto*, immediately upon the requirement or creation of such property, awakens and brings into life the lien agreed upon. As between the parties themselves, no further action is necessary or required to be done. This section is the same as that of the proposed Civil Code in New York, and appears to have been founded upon the case of Seymour v. Railroad Co., 25 Barb. 285. That was a proceeding to foreclose a mortgage upon the defendant road, and the defense by adverse claimants to certain of the property was that the mortgage, at the time of its execution and record, covered only a small portion of the property sought to be subjected to its lien, and that as to such after-acquired property the mortgage was invalid as against creditors of the road. It appears from the case that only a portion of the road had been constructed when the mortgage was made and recorded; that a large portion of the right of way was subsequently acquired, and the road-bed, depots, warehouses, and other appurtenances were a long time thereafter built, erected, and constructed upon and along the same. The case was elaborately argued, and the decision of the court by E. DARWIN SMITH, J., reviews the cases at length. It was contended in that case, as in this, that the instrument called a "mortgage," as to after-acquired property, was, at most, but an agreement to mortgage; that it was not itself a mortgage, and could not, by its execution or record, create a lien upon the defendant's property not then in existence, as against other creditors; that such agreement must be carried into execution by the making and recording of a mortgage subsequent to the creation and ownership of the property sought to be subjected to its lien; but the court, referring to the cases which seem to support such a doctrine, says: "If the learned judge means by this that a sale, assignment, or mortgage of prop-

erty not *in esse*, or of contingent interests or expectancies, confers no title or interest in the thing *in præsenti*, that is self-evident; but if it is meant that the sale or assignment of such property, to be acquired *in futuro*, or of contingent interests or expectancies, rests in contract merely till some new assurance, and does not attach as a lien or charge as soon as the property is acquired, or has substantial existence, I cannot agree with him. As soon as the property is acquired or comes into existence, the lien in or upon it attaches. They come into being together, and co-exist." This case has been cited and approved by many later cases in New York; and while mortgages upon railway property, filed before completion thereof, have been sustained by the courts upon other grounds, as that of public policy, the court in this case puts the right of recovery solely upon the equitable right of the mortgagee to hold under the original contract, without subsequent ratification on the part of the mortgagor, or any affirmative act on the part of the mortgagee, even as against creditors of the mortgagor. The case is cited and relied upon by the original codifiers, and the equity rule announced in that case has become the law of this territory, both upon the law and equity side of the court.

It is contended, however, that the equity rule, as announced by our statute, extends only to parties and those having notice of the existence of the agreement; that this defendant could not be charged with constructive notice of the filing of such contract of lien; and that to charge it with such notice it was incumbent on the plaintiff to file such mortgage at the time of, or subsequent to, that when the lien attached. It is conceded in this case that the instrument had all the statutory requirements to admit it to be filed — that is, it was signed, witnessed, and executed in accordance with the statute; and the only question is, was the filing of it prior to the attachment of the lien which made it a mortgage in effect, and keeping it on file thereafter, a valid filing? There is no provision of our statute that requires the filing of a chattel mortgage to be made at any particular time with reference to its making or delivery. The only provisions bearing upon this question are those found in sections 4379, 4380, Comp. Laws, which read as follows: "A mortgage of personal property is

void as against creditors of the mortgagor, and subsequent purchasers and incumbrancers of the property in good faith, for value, unless the original, or an authenticated copy thereof, be filed by depositing the same in the office of the register of deeds of the county where the property mortgaged, or any part thereof, is at such time situated.

The filing of a mortgage of personal property, in conformity to the provisions of this article, operates as notice thereof to all subsequent purchasers and incumbrancers of so much of said property as is at the time mentioned in the preceding section situated in the county or counties wherein such mortgage or authenticated copy thereof is filed." Clearly these sections do not make void or invalid an instrument filed before or subsequent to its delivery or inception as a mortgage, so that it be properly filed before hostile interests attach. The statute does not require a filing of the mortgage to give it validity, as in some states. The requirement of the filing is to cut off rights of innocent third parties. Between the parties to the instrument the mortgage is valid, though never filed.

If, as claimed by the defendant, the mortgage must be filed in the office of the register of deeds of the county where the property is situated at the time it is made, this mortgage would come within such requirement, since it was not a mortgage until the lien attached by the bringing into existence of the property enumerated therein; and at such time it was already filed, and prior to any rights accruing to this defendant. Suppose, under this rule of our statute, A., having in his possession the material from which certain machinery was to be constructed, should contract with B., the owner thereof, for a pledge of such machinery, so to be constructed, as security for the performance of some obligation on the part of B., would it be contended that upon the construction of such machinery it would be necessary for A. to surrender the possession to B., and again retake it, before the lien of the pledge would attach? Yet that is precisely what is contended for here. In the case of the pledge, A. has possession of the machinery at the time when, under the statute, the lien attaches as between the parties. He also has such a possession as, under the statute, is notice to third parties, and the law will not require



the useless thing of surrendering such possession, that it may be again delivered to him under the pledge. No more was it necessary for this plaintiff, whose contract for a mortgage had all the essentials of a mortgage except the attachment of the lien, to withdraw from the files of the register such instrument, and return it again to his control. It is the fact that the instrument is on file when hostile rights seek to attach that gives the filing effect, rather than the fact that such filing was made at some particular date. It is not the indorsement of the date, and signature of the proper officer, upon an instrument, that makes the filing. Such act is mere evidence or memoranda of the fact of filing. The filing is a continuous act. It is the fact of being on file — that is, among the files or records of the office — that gives it validity as against third parties. Every such paper is continuously filed every day that it remains in the office of the custodian thereof. The date of filing is but the date of the commencement of the filing. This mortgage was filed, in contemplation of law, every day it remained on file in the office of the register of deeds after the property came into existence; and it was filed in such office on the day the lien attached to the growing crop. The proposition is by no means a new one. Persons who have conveyed real property, with covenants of warranty to which they had at the time no actual title, when subsequently they have acquired such title, *eo instanti* convey such title by operation of law to their grantee. No hostile interests can intervene. The person recovering such subsequent title cannot convey it, and the record of the former conveyance is a good record to all the world of the title which has been subsequently conveyed by operation of law. Section 4351, Comp. Laws, provides that the "title acquired by the mortgagor subsequent to the execution of the mortgage inures to the mortgagee as security for the debt in like manner as if acquired before the execution." Will it be contended, under this statute, that when such subsequent title is inured to the mortgagee he must withdraw his mortgage from the files, and refile the same?

What we have here said, and the questions determined in this case, have no reference to instruments and contracts not properly executed, so as to admit them to be filed of record, nor to instruments that may be filed in the county where the property was not



situated when the mortgage was made or its lien attached. We simply hold that, under our statute, a mortgage of personal property to be acquired or created in the future, duly executed, and filed in the office of the register of deeds of the county in which such property is situated before and at the time of its creation or acquirement, becomes thereupon a good and valid mortgage between the parties and all subsequent purchasers and incumbrancers, without further ratification on the part of the mortgagor, or any affirmative act on the part of the mortgagee, subsequent to the attachment of the mortgage lien.

The judgment of the lower court is, therefore, affirmed. All the justices concur except TEMPLETON, J., not sitting.

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BEACH, Appellant, v. BEACH, Respondent.

**1. Jurisdiction — Motion — Notice — Service — Sufficiency.**

On an issue of the sufficiency of the service of a notice on the plaintiff to vacate a judgment in his favor rendered some three years before, it appeared the notice was served on one of his attorneys of the firm of record, (the firm having in the meantime been dissolved); that the attorney served appeared to question the sufficiency of the service merely, and stated he had not been employed to resist the motion, but that he had informed the plaintiff of its pendency and had received a message from him that affidavits in resistance of the motion had been sent to him, the attorney, and those affidavits were afterward used on the hearing. *Held*, the court acquired jurisdiction of the plaintiff to determine the motion.

**2. Same — Service by Publication, Affidavit for — Sufficiency.**

Where by § 104, C. C. Pro., it is provided that "where the person on whom the service of the summons is to be made cannot, after due diligence, be found within the territory, and that fact appeared by affidavit to the satisfaction of the court or a judge thereof \* \* \* such court or judge may grant an order that the service be made by the publication of a summons," and the affidavit for publication in a case when such service could be had stated, that the defendant could not, after due diligence, be found in the territory, and that the plaintiff did not know his residence or whereabouts, and could not by reasonable diligence ascertain the same. *Held*, the affidavit was insufficient, and the judgment rendered thereon void.

**3. Same — Vacation of Void Judgment — Remedy.**

Where a judgment is void for want of jurisdiction it may be vacated by a motion made in the original action.

(Submitted Feb. 16, 1889; affirmed May 31, 1889; opinion filed Oct. 10, 1889.)

**A**PPEAL from the district court, Lawrence county; Hon. CHAS. M. THOMAS, Judge.

This is an appeal from an order setting aside a decree of divorce.

*C. L. Wood (Gilger & Harrison, of counsel), for appellant.*

The court erred in entertaining the respondent's motion for the following reasons: 1. There was no notice thereof given to the appellant. 2. There was no appearance for or in behalf of the appellant. 3. The court in no way acquired jurisdiction of the appellant for the purpose of this motion. 4. The sufficiency of the affidavit for publication of the summons had once been determined by the court in a regular proceeding for that purpose and could not be reviewed except on appeal.

Wood in his individual capacity had never been the attorney of record for the appellant, and the firm of Nowlin & Wood had been dissolved a year and a half before the notice was served. The dissolution of the firm dissolved the relation of attorney and client between it and the appellant if such relation had not been previously dissolved. Lindley, Part., §§ 216 and 404, n. 2. Further, on entering the decree the authority of Nowlin & Wood terminated. Hinkley v. St. A. F. W. Co., 9 Minn. 55; Berthold v. Fox, 21 id. 51; Weeks, Attorneys, § 238; Hanson v. Stocking, 35 Minn. 207. More than two years had elapsed since the judgment was entered, the firm had been dissolved and Wood had not been employed by the appellant to resist the motion.

The court had previously determined the sufficiency of the affidavit for the service of the summons, both at the time of granting the order and the rendition of the decree. If there was error respondent's only redress was by appeal. *Ætna Life Ins. Co. v. McCormick*, 20 Wis. 265; *Bank v. Moss*, 6 How. (U. S.) 31.

This motion could not be made under section 104, C. C. Pro., because actions for divorce are expressly excepted from the provisions allowing defendant to defend after judgment. It must have been made under section 143. The only power or authority here is to relieve a party by permitting him to make any defense which could have been made upon a trial of the cause. In such case a meritorious defense should be tendered. The court is not authorized to set

aside a decree, dismiss the action and enter judgment in favor of the party seeking the relief, as was done in this case.

If the court should hold that this motion could not be granted under section 143, then the application should have been by original bill, an action brought to set aside the decree on the grounds set forth in the motion. The application would then have been heard and tried regularly and not upon *ex parte* affidavits. This remedy could be resorted to, independently of the statute, but there is no law or rule of practice which will permit a court to open and set aside a decree which is regular on its face, and dismiss an action on motion supported by *ex parte* affidavits after the lapse of nearly three years from its rendition.

*W. I. Walker*, for respondent.

A motion supported by affidavits was the proper remedy in this class of cases. 2 Tiffany & Smith, Pr. 14, 15, 16; 9 How. Pr. 35; 8 Abb. 49; Edson v. Edson, 108 Mass. 590; Wortman v. Wortman, 17 Abb. 66. The service of the notice of the motion upon one of the attorneys of record was sufficient to give the court jurisdiction to determine the motion. §§ 509, 513, 522, C. C. Pro.; Wait's Code, 417; Harst. Pr. 1015; Townsley v. McDonald, 32 Barb. 604.

The affidavit for service of the summons was insufficient. Wortman v. Wortman, 17 Abb. 66; Townsley v. McDonald, 32 Barb. 604.

Appellant was not a *bona fide* resident of this territory at the time of the commencement of this action. 2 Bish. Mar. and Div. (4th ed.), §§ 144, 154, 763.

The record shows that appellant practiced a fraud upon the court and his counsel. A decree so obtained will be vacated on motion. Edson v. Edson, *supra*; 2 Bish. Mar. and Div. (4th ed.) 751, 762, 763; Buckley v. Buckley, 6 Abb. Pr. 307; Berdin v. Fitch, 15 Johns. 121; Wortman v. Wortman, *supra*.

SPENCER, J. This action was brought by the plaintiff for a divorce against the defendant, on the ground of desertion and cruel and inhuman treatment. The defendant being a non-resident, service of the summons was obtained by publication, and after the completion of such service, the defendant not having

appeared in any way in said action, the court, upon proof of such facts, directed a reference to take the proofs which might be offered in support of the allegations of the complaint, and report the same to the court. Such proofs were duly taken, and thereupon, and upon all the proceedings in the cause, the court, on the motion of the plaintiff's attorneys, Nowlin & Wood, made a decree dissolving said marriage, which was duly entered on the 28th day of November, 1885. Nothing further occurred in said action until July 7, 1888, when the defendant appeared by her attorney, and served on Chauncey L. Wood, as attorney for the plaintiff (the firm of Nowlin & Wood, of which he was a member, having been theretofore dissolved), a notice of motion, accompanied by certain affidavits, made in the district court, which granted such decree; that such judgment and decree be vacated and set aside, on the ground that the same was obtained by fraud and deceit; and that the affidavit on which the order for service of the summons by publication was granted was not sufficient to authorize the court to grant such order, or to give the court jurisdiction of the subject-matter of the suit; and that at the time the action was brought the plaintiff was not a *bona fide* resident of this territory. Such motion finally came on for hearing before the court September 7, 1888; a supplementary notice of such motion, directed to said George E. Beach and Nowlin & Wood, having in the meantime (August 25, 1888) been served on said Wood; and on that day the said Wood, being present, suggested to the court that the firm of said Nowlin & Wood had been dissolved; that he had not personally been employed by said plaintiff to resist said motion, but that he had learned the whereabouts of said plaintiff, and had informed him of the proceedings being taken by the defendant to set aside said judgment, and of the time the motion was to be heard; and that he had received from him, the day before, a telegram that he had forwarded by mail affidavits to be used in resisting said motion. The court thereupon decided that the service of notice of such motion was sufficient to confer jurisdiction upon it to hear and determine the same, to which the plaintiff, by his said attorney, then excepted, having appeared especially to object to the sufficiency of said notice. The court thereupon proceeded to hear said motion upon its merits (the said

Wood then appearing for said plaintiff, and resisting the same), and, after hearing the proofs and arguments in behalf of the respective parties, found that said judgment was fraudulently obtained; that the court had not gained jurisdiction of the defendant; that the affidavit upon which the order for the service of the summons by publication was granted was untrue, to the knowledge of the plaintiff, and was made with intent to, and did, deceive the court; and ordered and adjudged that the decree and judgment dissolving the marriage between the plaintiff and defendant, November 27, 1885, be vacated and set aside, to which order the plaintiff duly excepted. This and the exception before noted present the only questions it is necessary to determine on this appeal, and will be considered in the order mentioned.

1. Did the court have jurisdiction of the plaintiff for the purpose of determining said motion?

The general rule undoubtedly is, that the power of an attorney under a general retainer expires when judgment is finally rendered, for usually there no longer exists any occasion for his services. The judgment is the final determination of the matters about which the attorney was retained. *Macbeath v. Cooke*, 1 Moore & P. 513. But this is not so for every purpose, for at the common law the attorney's power was supposed to continue a sufficient length of time after entry of judgment to permit him, where successful, to issue execution, and until such action as might be necessary for the collection and satisfaction of the judgment. *Gilb. Ex'ns*, 93. This rule has become a part of the statute law of this territory to such an extent that the attorney of record for the successful party may at any time collect the judgment and execute satisfaction thereof. § 5107, Comp. Laws. So after final judgment, if appeal be taken or writs of error brought, the employment of the attorney of record, in the absence of special notice indicating the contrary, is presumed to have continued, and the statute provides that notice shall be served upon them in such case. § 5336, *id.* This was also the rule before the Code. If the judgment be entered irregularly, shall not the attorney whose duty it was to enter it properly be served with notice of motion that it be corrected? It would seem that he more than any other person, even the party himself, is

the one that ought to be notified; for, having been the attorney of record, and conducted the matters to a conclusion, he is best able to resist any attack upon it. These reasons apply with quite as much force when, as in this case, it is sought to set the judgment aside for fraud and want of jurisdiction in the court rendering it. *Lusk v. Hastings*, 1 Hill, 656, is analogous in many respects; and see, also, *Doane v. Glenn*, 1 Colo. 454.

In *Lee v. Brown*, 6 Johns. 132, it was directed that an order to show cause why a judgment that had been entered seven years before should not be satisfied of record should be served on the attorney of record at the time the judgment was entered, the plaintiff in such judgment being absent from the state.

If doubt remained of the sufficiency of the service of the notice, it would be dissipated by the admission of plaintiff's attorney that he had received a communication from plaintiff personally informing him substantially that he had forwarded affidavits to him to be used in resisting the motion, and he did use them in opposition thereto. We conclude that the first assignment of error, therefore, is insufficient, and must be overruled.

2. Nor do we think the second objection of plaintiff, that defendant's remedy was by action to set the judgment aside, and not by motion to vacate it, maintainable.

It will be observed that the motion was to set aside and vacate the judgment of divorce granted by the district court, on the ground of a want of jurisdiction of the defendant in the court to grant such judgment, in that the summons in such action was not legally served. It is provided by section 104 of the Code of Civil Procedure that "when the person on whom the service of the summons is to be made cannot, after due diligence, be found within the territory, and that fact appears by affidavit to the satisfaction of the court or a judge thereof, and it in a like manner appears that a cause of action exists against the defendant in respect to whom the service is to be made," etc., "such court or judge may grant an order that the service be made by the publication of a summons," in the cases particularly specified in the section, the last of which is (subdivision 5) "when the action is for a divorce or decree annulling a marriage." The affidavit of the plaintiff on which the order for service of the summons by

publication was made in this case, stated that defendant could not after due diligence be found within this territory, and that he did not know her residence or whereabouts, and could not by reasonable diligence ascertain the same. It is nowhere stated that any effort whatever was made to find the defendant within this territory, or that the slightest diligence was exercised for that purpose, or in that direction. The affidavit not only fails to show that the defendant could not be found within this territory, after due diligence, but practically admits that no effort or attempt was made within the territory to find her. The affidavit should not only have stated diligence had been used to serve the defendant with the summons within the territory, but in what the diligence consisted, what had been done to find her.

Jurisdiction of absent defendants cannot be acquired except by complying strictly with the provisions of the statute provided for that purpose. As was said by Justice ALLEN in *Cook v. Farmer*, 12 Abb. Pr. 359: "The jurisdiction is strictly statutory, and can only be acquired in the mode required by the statute." Within this rule it is clear that the affidavit on which the order for service of the summons by publication in this action was made was insufficient, and that the court did not gain jurisdiction of the defendant, and that the judgment sought to be reversed was obtained by fraud and false statements. See, also, *Hallett v. Righters*, 13 How. Pr. 43; *Brisbane v. Peabody*, 3 id. 109; *Van Wyck v. Hardy*, 11 Abb. Pr. 473.

The judgment of divorce in this case, rendered November 28, 1885, was, therefore, rendered by a court having jurisdiction neither of the parties nor the subject-matter of the suit, and was absolutely void. *Borden v. Fitch*, 15 Johns. 121; *Harris v. Hardeman*, 14 How. 334; *Hoffman v. Hoffman*, 46 N. Y. 30.

It is well settled that such judgments may be set aside and vacated on motion made in the original action, and such has been the practice generally in such cases. The court having jurisdiction of the motion may set aside and vacate a judgment on the ground of fraud, or that the parties sought to be bound by the judgment were not served with process, or that the court in which the judgment was rendered did not have jurisdiction, and proceedings for that purpose may be taken by suit or by motion in the



original action, in the discretion of the court. *Beards v. Wheeler*, 76 N. Y. 213; *Foote v. Lathrop*, 41 id. 358; *Schaettler v. Gardiner*, 47 id. 404; *White v. Coulter*, 59 id. 629. The cases of *Wortman v. Wortman*, 17 Abb. Pr. 66, and *Bulkley v. Bulkley*, 6 id. 313, are very analogous to the case at bar. Both were actions for divorce, in which judgments had been entered for the plaintiff, and proceedings were taken by motion to have the judgments vacated and set aside, on the ground of fraud in the manner of service and want of jurisdiction, and in each of which such motions were granted. In the case at bar the district court has found as a fact, upon abundant evidence, that the plaintiff did practice a fraud upon it and upon his own attorney in obtaining the order for service of summons by application; that at the time he made the affidavit to obtain such service he in fact did know the residence and whereabouts of the defendant, and designedly stated that he did not for the purpose of misleading the court and defrauding the defendant of notice that such an action was pending. The court was deceived by this false statement, and the defendant was prevented from having her day in court and opportunity to defend the action against her.

The order appealed from should be affirmed. All the justices concurring, except THOMAS, J., not sitting, order affirmed, with costs and disbursements.

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COUNTY OF NELSON, Respondent, *v.* NORTHCOTE ET AL., Appellants.

**1. Action — Damages — Fraudulent Act — Liability.**

In order to maintain an action for a fraudulent act it is not only necessary to prove damages but it must appear that they were the necessary result of the act and such as can be clearly ascertained.

**2. Same.**

Where by statute it was made the duty of the county treasurer to settle with the commissioners at stated periods, and the defendants, knowing the treasurer was a defaulter, and with the intention of concealing it and defrauding the county, loaned him funds to effect his settlement, and the commissioners being deceived, audited his accounts, continued him in office, and he afterward embezzled further funds of the county and fled the territory, *held*, the defendant sustained no liability to the county.

(Argued May 22, 1889; reversed May 31; opinion filed October 10, 1889.)

**A** PPEAL from district court, Nelson county; Hon. CHAS. F. TEMPLETON, Judge.

Action for damages alleged to have been sustained by the plaintiff by reason of fraud and collusion on the part of the defendants and one Andrew Holman, county treasurer of said plaintiff, by which it is alleged the plaintiff was defrauded and sustained damage.

Demurrer was first interposed to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, which was overruled. The defendants answered. Upon the trial before the court with a jury, the plaintiff had judgment, and the defendants appealed.

*Ball, Wallin & Smith*, for appellants.

*Bosard & Corliss*, for respondent.

SPENCER, J. (*After stating the facts substantially as above.*) By the complaint in this action it is alleged that the plaintiff is a municipal corporation, one of the counties of this territory; that defendants were bankers, carrying on business at Lokota, Nelson county; that one Andrew Holman was county treasurer of said county, duly elected and acting as such, and that, as such treasurer, he deposited the funds of said county received by him in defendants' bank, and kept his account therein; that on the 5th day of January, 1886, said Holman was an embezzler in the sum of \$9,300 of said county's funds, which had come into his hands as such treasurer; that the defendants knew at that time that said Holman had been using said funds of said county so deposited with them for the purpose of paying his personal debts, and that he had paid his private debts from the funds of said county so deposited; that, under the statute of this territory, it was the duty of said Holman, as such treasurer, on the 5th day of January, 1886, to attend before the board of county commissioners of said county and exhibit his accounts and vouchers as such treasurer, and the moneys in his hands belonging to such county; that on said day as such treasurer, he should have had in his hands of the moneys of said county, which he had received, and for which he was chargeable, the sum of \$15,221.78; that he did not have such sum

of said funds of said county in his possession, or under his control, but that he had at such times embezzled the sum of \$9,300 thereof; that upon such accounting by said Holman, as such treasurer, he exhibited to the county commissioners, among the moneys of said county, the sum of \$4,200, in cash, and a certain certificate of deposit issued by said defendants to him for the sum of \$2,600, and a bank draft for the sum of \$2,500, issued by the defendants to him; that said \$4,200 cash, and certificate of deposit, and draft were not the property of said Holman, either individually or as such treasurer, or the property of said county, but were temporarily loaned by said defendants to said Holman for the sole purpose of enabling him to conceal, by means thereof, his said embezzlement of said county's funds in his hands as such treasurer, and with the intent on the part of said defendants to deceive and defraud said county thereof; that said defendants knew that said Holman had misappropriated said county's funds, and that he received said cash, certificate, and draft for the sole purpose of exhibiting them to said board of county commissioners as money in his hands as such treasurer, for the purpose and with the intent of concealing his embezzlement, and that the defendants, knowing said intent on the part of said Holman to deceive said board of county commissioners and conceal his embezzlement and defraud said county, conspired and colluded with said Holman to conceal such embezzlement and deceive such board of county commissioners, and for that purpose, and with such intent, loaned said Holman said \$4,200 cash and said certificate and draft; that said Holman did exhibit to said board of county commissioners such money, certificate, and draft with the money remaining in his hands as such county treasurer, and that they, believing the same to be county funds of said county, in the hands of said Holman as treasurer, did audit and allow his accounts as such treasurer as correct, and, relying thereon, did refrain from taking any steps to have said Holman arrested and prosecuted for embezzlement, and from having sued him while he was in this territory, and suffered him to remain in office as such treasurer; and that thereupon, and subsequently to said 5th day of January, 1886, and while still acting as such treasurer, he embezzled of the funds of said county, which came into his hands as such treasurer, the further sum of

\$6,726.26, and that before such embezzlement was discovered he fled from said territory, and has not since returned or been discovered, or been arrested for such embezzlement; that by reason of such fraud and collusion said board of county commissioners were deceived, and, believing such money, draft and certificate, so temporarily loaned by said defendants to said Holman, were the property and funds of said county, and relying thereon, refrained from having said Holman arrested and prosecuted until he had fled from the territory, and refrained from suing said Holman to recover said sum so embezzled as aforesaid until he became hopelessly insolvent.

To this complaint the defendants demurred. The demurrer was overruled, and the defendants answered. Upon the trial of the action the plaintiff had judgment; the court, however, limiting the amount of the recovery to the sum which was embezzled by Holman subsequently to the accounting of January 5, 1886.

The only fraud alleged in the complaint, and proved upon the trial of the action, is that the defendants, knowing, or having knowledge of the circumstances sufficient to charge them with knowledge, that Holman was an embezzler of the county's funds on the 5th day of January, 1886, loaned him a sum of money and some cash certificates for the purpose of enabling him thereby to cause the county commissioners to believe that the money and funds thus exhibited belonged to the county, and thus secure his accounts to be audited and his embezzlement to be concealed; that the county commissioners were deceived thereby, and refrained from bringing action against said Holman to recover such funds, or to prosecute him, until he had escaped from the territory.

The verdict of the jury being against the defendants, the truth of all the material allegations of the complaint is established. The question, therefore, for our determination is whether these facts are sufficient, in law, to entitle the plaintiff to judgment.

The gist of the injury complained of is the fraudulent act of the defendants in loaning Holman the money and certificates to enable him to have his accounts as county treasurer audited, and conceal from the board of county commissioners the fact of his embezzlement of the funds of the county, knowing that he was an embezzler.

In order to maintain an action for the fraudulent acts of another, it is absolutely necessary for the plaintiff to prove, not only that damage has been sustained by him, and that the defendant has committed a wrong, but also that the damage is the necessary result of the wrongful act, and such damage must be susceptible of proof, and capable of being clearly ascertained. *Lamb v. Stone*, 11 Pick. 526.

What damage has the plaintiff sustained by reason of the fraudulent acts alleged and found against the defendants? It lost no claim or lien against the property of Holman, for it had no lien thereon. Nor is it even alleged that he at any time had any property from which the deficit could have been made. It did not lose custody of his body, for he had not been arrested, nor, so far as the record indicates, had any steps whatever been taken to that end. There is nothing to show that any such proceeding was contemplated. All that can be said is that if the defendants had not by their fraudulent act in loaning Holman the money and certificates, and thus have enabled him to deceive the board of county commissioners, he could not have concealed the first of his embezzlement, that they would have discovered it, and, having discovered it, would have prosecuted him criminally, and brought actions against him to recover the amount.

Upon what theory can an action for such an injury be maintained? How is the fact that the plaintiff refrained from procuring the arrest of the defaulter because of this act of the defendants to be established? By what process are we to determine what designs the county commissioners would have formed in their minds had they known facts of which they were ignorant, or, having ascertained them, what action they would have taken? We may speculate on what men would ordinarily do under such circumstances, but to prove precisely what they would do, so as to know it as an established fact, is an absolute impossibility. But if we assume that the county commissioners, had it not been for the fraudulent act of the defendants, would have discovered the embezzlement by Holman, and removed him from office, could we then say that the plaintiff had shown itself entitled to recover against the defendants for the amount stolen subsequent to January 5, 1886, the day the fraud was committed which enabled

Holman to conceal his crime? To do this we should be obliged to determine that the county treasurer who would have been appointed to succeed him would have been more honest, and not have embezzled the funds. How is this to be proved? How is it to be determined who they would have appointed, or that such appointee would not have embezzled the county's funds, or that they might not have been stolen by some one else? Such facts are not susceptible of legal proof. They are wholly conjectural, and beyond the limits of the knowledge of mankind. And though it is not alleged that Holman at any time had any property, yet, if we assume that he had, we cannot undertake to say that he might not have sold it to a *bona fide* purchaser, or that some other creditor would not have attached it. It is, therefore, impossible to determine whether the plaintiff would have discovered the embezzlement, and had Holman arrested, or have recovered the amount embezzled, had the defendants not loaned him the money or certificates; and it is equally impossible to ascertain whether he would have been suspended from his office, or his successor therein would not have embezzled a like sum. It is not apparent wherein the plaintiff has sustained any damage by the fraud or wrong of the defendants; but, if it has, it is impossible of ascertainment, and is too contingent, remote, and indefinite to constitute a cause of action. The act of the defendants in loaning him the money and certificates was not illegal. It was lawful in itself, and cannot be made the ground of a recovery against them.

This case is analogous to that of *Bradley v. Fuller*, 118 Mass. 239. In that case the allegations of the complaint were that the defendant represented to the plaintiff that a corporation, of which he was treasurer, and against which the plaintiff then held an overdue note, owed no other debts, and that there were no attachments upon its property; that such representations were made falsely and fraudulently, and for the purpose of inducing the plaintiff not to commence an action against said company until after the property thereof should be placed out of reach of process by plaintiff; that all the property of the company was subsequently attached and sold upon other debts; and that the plaintiff, relying on such representations, lost his debt. It was alleged, also, that the plaintiff was induced, by the representations made by said de-

fendant, to forbear securing payment of his note by attachment of said company's property, as he might and would have done but for such representations. In passing upon the question of the sufficiency of this declaration the court said: "The facts stated in these counts do not show a legal cause of action. \* \* \* There is no attachment, or attempt to attach, on the part of the plaintiff, alleged. It does not appear that by reason of the alleged representations he lost any thing which he ever had. Taking these counts in the most favorable sense for the plaintiff, they simply charge that the plaintiff, induced by the falsehood alleged, refrained from carrying into effect an intention to attach, and that another creditor did attach and apply the company's property in payment of his debt." And the complaint was dismissed because it did not state a cause of action.

This is a much stronger case for the plaintiff than the one at bar, for in this complaint it is not even stated that there was any intention to institute proceedings for the recovery of money. There could not have been, for the plaintiff did not know of the embezzlement; but there is no allegation that Holman owned any property at any time, and, indeed, there is no allegation that he has not now property within the territory. So in *Lamb v. Stone*, 11 Pick. 527, which was an action to recover damages from the defendant because of a fraud perpetrated by him upon the plaintiff in purchasing the property of a person who was indebted to the plaintiff, and assisting him to abscond in order to prevent the plaintiff from collecting his debt. The court held that these facts did not constitute a cause of action. In *Wellington v. Small*, 3 Cush. 145, it was alleged that the defendants and Dexter Small were merchants, and that the latter purchased goods of sundry persons on credit to a large amount; that he gave notes therefor, which were indorsed to plaintiff; that he had not paid the same, and was insolvent, and had no property; that before the notes matured the defendants combined to defraud the plaintiff, and, to enable Dexter Small to take the poor debtor's oath, and to hinder and delay the plaintiff from securing and recovering payment of his debt, and fraudulently and without consideration, removed from the state a large portion of said Dexter Small's goods; that the defendant George Small fraudulently received



and concealed the same from plaintiff, and prevented the levying of an attachment upon them, both parties knowing that the goods, or the notes given therefor, had not been paid; that the defendant afterward, in pursuance of their fraudulent and unlawful intent and conspiracy, canceled and discharged a valid debt due from one George Small to Dexter Small, and removed other goods of said debtor out of the state fraudulently and with such intent; that plaintiff had recovered judgment against said debtor, but by reason of the fraudulent acts of said debtor he was unable to collect his judgment; and that said debtor had been enabled to take the poor debtor's oath by the alleged fraudulent action of said defendant, and had taken the same and been discharged. The court, in giving its opinion, said: "The uncertainty of the plaintiff's damage seems, of itself alone, to be a sufficient reason for his not recovering. In an action on the case *ex delicto* the plaintiff must show injury and damage; and these must be shown as facts, by legal proofs, except in a few cases, where, by the rule of law, damage is presumed from the act complained of. This case does not fall within that exception. How could this plaintiff prove that he suffered any damage from the acts of the defendant which are averred in the declaration? How could he prove that he would have secured his debt by attaching the property of his debtor, if the defendant had not intermeddled with it? Other creditors might have attached it before him, or it might have been stolen or destroyed while in the debtor's possession. The fact that the plaintiff has suffered actual damage from the defendant's conduct is not capable of legal proof, because it is not within the compass of human knowledge, and, therefore, cannot be shown by human testimony. It depends on numberless unknown contingencies, and can be nothing more than a matter of conjecture." To the same effect are *Morgan v. Bliss*, 2 Mass. 111, and *Randall v. Hazelton*, 12 Allen, 412.

The allegation of conspiracy in the complaint does not change the nature of the action. The ground of the action is the fraud committed, the wrong done, and the damage occasioned thereby. An allegation of conspiracy is doubtless proper when it is sought to charge two or more defendants with combining or acting jointly to accomplish the wrong complained of, but it is not es-

essential for any other purpose. *Verplank v. Van Buren*, 76 N. Y. 247; *Parker v. Huntington*, 2 Gray, 124; *Laverty v. Varnarsdale*, 65 Pa. St. 507.

The cases relied upon by the plaintiff (*Zabriskie v. Smith*, 13 N. Y. 328; *Pasley v. Freeman*, 2 Smith, Lead. Cas. 75; *Endsley v. Johns*, 60 Am. Rep. 572, 12 N. E. Rep. 247; and others) are not analogous to the case at bar, and do not sustain the plaintiff's contention.

We are unable to discover any legal hypothesis upon which this action can be sustained, and the judgment appealed from must, therefore, be reversed and the action dismissed. Judgment reversed and action dismissed, with costs; all the justices concurring, excepting McCONNELL and TEMPLETON, JJ., not sitting.

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SCHMIDT, Respondent, v. LEISTEKOW, Appellant.

**1. Master and Servant — Duty of Master to Servant.**

It is the duty of a miller to furnish his servants with such machinery and appliances as are reasonably safe for the purposes for which they are used, and to also keep them in proper repair.

**2. Same — Defective Machinery — Evidence, Sufficiency of.**

In an action against a mill-owner by a servant for injuries sustained through alleged negligence in the construction of the mill and machinery furnished, it appeared that the servant, in the performance of his duties, got upon a spout used for passing mill-stuffs from one part of the building to another, and it gave away, whereby his arm was precipitated into a set of cog-wheels; but the undisputed evidence was that the mill was constructed of the materials and in the manner such buildings usually were; that the spouting was of the character generally used in such mills and possessed the requisite strength for the purposes it was intended; also, that prior to the accident, in the performance of a similar duty in a like manner, this same spout gave away with him on a former occasion and he helped repair it, using the same materials and placing it the same as before, so that it was no stronger than originally. *Held*, he was guilty of such contributory negligence as precluded a recovery.

**3. Same—Fellow-Servants, Who Are.**

Where two servants of the same master are engaged together in the accomplishment of a common object, the one having no control or authority over the other, they are co-employees within the meaning of the rule that exempts the master from liability to one for injuries received through the negligence of the other.

(Argued Feb. 9, 1889; reversed Feb. 19; opinion filed Oct. 10, 1889.)

**A**PPEAL from district court, Grand Forks county; Hon. W. B. McCONNELL, Judge.

This was an action to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendant as second miller, alleged to have been caused by the negligent and defective construction of a flouring-mill, and a failure on the part of the defendant to furnish suitable and safe machinery, and keep the same in proper repair.

The facts necessary to an understanding of the case are stated in the opinion.

*P. J. McLaughlin* and *P. M. Babcock*, for appellant.

The facts disclosed showed the plaintiff and Brenner were co-employees. The court erred in submitting this to the jury. *Wallcott v. Studebaker*, 34 Fed. Rep. 8; *Lewis v. Leifeth*, 11 Atl. Rep. 514.

At the time respondent commenced work he was a miller of more or less experience and presumed to be familiar with the construction of such mills and their machinery. This mill was constructed in the usual and ordinary manner. These particular spouts as well as all the machinery and gearing in the mill were in plain sight. Respondent had worked continuously for eight months around and about this spouting, and had all the opportunity of knowing its condition possessed by any one; hence, it is immaterial whether he in fact knew its condition or not; he had the opportunity of knowing it, and in such cases he is chargeable with the same responsibility as though he in fact possessed the knowledge. *McGlynn v. Brodie*, 31 Cal. 377; *Dillon v. R. R. Co.*, 3 Dill. 319; *Davis v. R. R. Co.*, 20 Mich. 105; *Stone v. Manfg. Co.*, 4 Ore. 52; *Sullivan v. India Manfg. Co.*, 113 Mass. 396; *Green v. R. R. Co.*, 31 Minn. 248; *Leonard v. Collins*, 70 N. Y. 90; *Naylor v. R. R. Co.*, 11 N. W. Rep. 24; *Atchinson v. R. R. Co.*, 7 Pac. Rep. 204; *Wilson v. R. R. Co.*, 39 N. W. Rep. 909.

The uncontroverted evidence shows that the mill, spouting, machinery and all of the appliances used, were constructed in the usual and ordinary manner, so the duty of appellant toward his

employees was discharged, and the court ought to have directed a verdict for the appellant. *Worder v. R. R. Co.*, 32 Md. 411; *Beach, Contributory Neg.* 354; *Burke v. Witherbee*, 98 N. Y. 565; *R. R. Co. v. Gildersleeve*, 33 Mich. 137; *Devlin v. Smith*, 89 N. Y. 476; *Buzzell v. Mfg. Co.*, 48 Me. 116; *Hayden v. Mfg. Co.*, 29 Conn. 557; *Kelly v. R. R. Co.*, 28 Minn. 98; *Kolsti v. R. R. Co.*, 32 id. 133; *Oneill v. R. R. Co.*, 1 McCrary, 505; *Donaldson v. R. R. Co.*, 21 Minn. 293; *Brown v. R. R. Co.*, 22 id. 165; *Fernandez v. Sacramento R. R.*, 52 Cal. 45; *R. R. Co. v. McElwell*, 67 Pa. St. 311; *Beach, Con. Neg.*, § 162.

The evidence shows that the plaintiff's own negligence contributed to the injury.

*Cleland & Sauter, Noyes & McGee* and *R. E. Noyes*, for respondent.

The evidence establishes that Brenner was a vice-principal. It also establishes that the appellant was negligent. *Herbert v. Northern P. Ry. Co.*, 3 Dak. 38; *S. C.*, 6 Sup. Ct. Rep. 591; *Wedgewood v. C. & N. W. Ry. Co.*, 41 Wis. 483, 44 id. 489; *Smith v. R. R. Co.*, 42 id. 526; *Thompson v. Drymala*, 26 Minn. 40; *Tierny v. M. & St. L. R. R. Co.*, 23 N. W. Rep. 229; *King v. Ohio R. R. Co.*, 14 Fed. Rep. 277; *Beach, Con. Neg.*, §§ 110, 112, 113.

The evidence does not show such negligence on the part of the respondent as directly, or by natural consequence, conduced to the injury. *Hammond v. Town*, 40 Wis. 35; *Griffin v. Town*, 43 id. 509; *Dreher v. Fitchburg*, 22 id. 643.

The burden of proof was upon the appellant. *Herbert v. Northern Pac. Ry. Co.*, *supra*; *Greene v. M. & St. L. Ry. Co.*, 17 N. W. Rep. 378; *Bessex v. C. & N. W. Ry. Co.*, 45 Wis. 483; *Houfe v. Town*, 29 id. 296; *Wharton, Neg.*, §§ 4-23.

The question of contributory negligence is one of fact for the jury. *Houfe v. Town*, *supra*.

SPENCER, J. (*After stating the facts as above.*) The defendant in this case was the owner of a flouring-mill situated in Grafton, Dak. The plaintiff was employed by the defendant in this mill in March, 1884, first as oiler of the machinery, in which employ-

ment he continued until the following July, when he was employed as second miller. In the performance of his duties as second miller he was required to work in and about the machinery, appliances, and spouting of said mill from twelve o'clock, noon, of each day until midnight, when he was relieved by a Mr. Brenner, the other second miller in said mill, until noon succeeding. Both were under the direction of a Mr. Smith, who was the first, or chief, miller, and the defendant himself. The plaintiff continued thus employed as second miller in this establishment until the 7th day of November, 1884, at which date, at about nine o'clock in the evening, while he was attempting to reach a hand-hole in a spouting which had become clogged, he climbed, either by means of a ladder or otherwise, upon a certain spout which had been erected for the purpose of passing middlings or mill-stuffs from one part of the mill to another, and which, under his weight, gave way in such manner as precipitated his arm into a set of cog-wheels situated in close proximity to such spot, which were in motion, and by means of which the injury complained of was produced.

The evidence does not disclose that there was any defect in the manner of the construction of the mill, or in the materials used, though this was alleged in the complaint; nor is there any proof tending to show that the machinery and the appliances, including the spouting, used in the mill, were not in all respects fit and proper for the purpose for which they were intended and used; nor is there any evidence that the machinery, spouting, and appliances were not properly placed and secured, with due regard to the uses they were intended for and put in running the mill, and the safety of persons engaged in using them. On the contrary, the evidence is undisputed that the mill was constructed of the material and in the manner such buildings are usually constructed; that the machinery and appliances, including the spouting, were of the character and kind generally used in such mills; that they were placed and secured in their places in the usual manner; and that the mill, its machinery, spouting, and appliances were in all respects fit and proper for the uses for which it was intended, and to which it was put by the defendant. The spouting which gave way was intended and used for the purpose of carrying mill-stuffs from one part of the building to another. It was not made

nor designed to sustain any considerable weight, and this the plaintiff necessarily knew, and was in its proper place, and secure for such purpose. It did not give way and produce the injury complained of because of any defect in its construction, or because it did not possess the requisite strength to perform the uses for which it was intended, and to which it was put, in carrying on the mill. It broke only because it was used by the plaintiff for a purpose and in a manner for which it was not designed, viz.: resting his weight to a greater or less extent upon it.

It was the duty of the defendant to furnish such machinery and appliances as were reasonably safe for the use of the operatives in his mill, considering the purposes for which they were to be used, such as a prudent man would furnish to save himself from injury that would result from unsuitable or unsafe appliances, and to maintain the same in proper state of repair. *Lof-tus v. Ferry Co.*, 84 N. Y. 455. This duty the defendant performed.

The evidence fails to show any negligence on the part of the defendant, either in the construction of the mill or in supplying safe and suitable machinery and appliances for it, and keeping the same in proper repair. He was not bound to anticipate that the spouting running between the different stories of his mill, for the purpose of passing grain and mill-stuffs from one place to another, would be used by one familiar with the purpose for which they were designed and used to bear his weight, or serve in the office of a ladder, floor, or platform. *Wonder v. Railroad Co.*, 32 Md. 411; *Buzzell v. Manufacturing Co.*, 48 Me. 116; *Burke v. Witherbee*, 98 N. Y. 562.

Bnt, if it be assumed that the defendant was negligent in that he did not maintain a stronger spout in lieu of the one that broke and caused the injury, the facts disclosed by the evidence would, nevertheless, prevent a recovery.

The plaintiff, some time before the occurrence of the accident complained of — about two months before — had occasion, while in the discharge of his duties, to clear a spout in the vicinity of this one, which had become clogged, by inserting his hand into this particular hand-hole. For this purpose he employed a ladder, and placed it against this identical spout, and climbed upon it,

when, being of insufficient strength to maintain his weight, it gave way — though in perfect order, so far as the evidence shows, for the use for which it was designed — let him down, but produced no injury. The following day he assisted in repairing it, using the same material for the same purpose, and fastening it together, and in its proper position, by the same means as before, and thus making it as it was before it was broken. He had thus learned by a practical test that this spouting, in its then position, and as then secured, was an unsafe place on which to bear his weight, and was incapable of sustaining it. True, he says that the repairs he assisted in making he supposed were only temporary, and that he understood that others were to be made by millwrights. Nevertheless, he saw, and helped to restore to the condition in which it was before — which is shown to have been the usual and ordinary condition of such appliances — the broken spout, and must be presumed to have known that, though it was amply able to withstand the pressure which its proper use called for, it was not of sufficient strength to justify one in putting his weight against it. Nor was he justified in supposing that the millwrights whom he saw at work in the vicinity had made repairs strengthening the pipe. The spout was already abundantly strong to support all the weight that was required of it; all that was necessitated by passing grain and mill-stuffs through it; all that it was necessary and desirable it should. It was of the material and kind generally employed for the purpose, and was secured in its place as such pipes usually are. There is no evidence that there is, or was at that time, any better or stronger method of securing such pipes. Why, then, should the plaintiff have supposed that this spout was by the millwrights to be made stronger than others of its kind, used for a similar purpose, and which fulfilled the purpose for which they were designed? This supposition, if he indulged it, was not justified. He had a right to believe that this spout would be restored, if it was not already, to such condition as to be fit, safe, and proper for the use for which it was employed, but not that it would be made stronger than other like appliances, intended for a similar purpose, or for purposes requiring greatly more strength than this, in its then use, was intended and calculated, to his knowledge, to supply. This spout



was in plain, unobstructed view of the plaintiff at all times while he was at work. No person was in better situation to know its condition than he, or had better opportunity to observe it, and no person knew better than he that it was not intended to go upon, and was not of sufficient strength to bear his weight. Even though he supposed the millwrights had made additional repairs to it, he was not justified in presuming that they had made it a safe place to stand upon, or to bear his weight, for he knew from its situation, the use to which it was put, the office it had to perform, that strength sufficient to bear his weight was not required. And yet, knowing all these things, he voluntarily, whether with or without a ladder is unimportant, went upon this spouting, and thereby exposed himself to the injury which followed. This was such contributory negligence on the part of the plaintiffs as to prevent a recovery.

There is nothing in the case indicating that Brenner occupied any other relation to the plaintiff than that of co-employee. They were engaged in precisely the same business, by the same employer, in the same kind of service, for the accomplishment of a common object, and neither had any control or authority over the other. *Wolcott v. Studebaker*, 34 Fed. Rep. 8; *Lewis v. Seifert*, 11 Atl. Rep. 514. No other point made requires examination. For the reasons stated, the judgment appealed from must be reversed and a new trial ordered. All of the justices concurring, except Mr. Justice McCONNELL, not sitting.

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**HUBER, Respondent, v. CHICAGO, M. & ST. P. RY. Co., Appellant.**

**1. Railroad Companies—Killing Stock—Evidence, Sufficiency.**

In an action against a railroad company for killing a horse through alleged negligence, the undisputed evidence showed that the accident occurred at a place where there was a down grade; that the train was running from eighteen to twenty miles an hour; that the horse came upon the track from five to ten rods ahead of the engine; that the engineer immediately upon seeing the horse whistled and reversed the engine; that the brakes were applied and every thing done possible to prevent the accident; that the engine and cars were provided with the usual and necessary appliances for stopping them; that the employees in charge of the train were experienced and competent hands. It also appeared the horse was hobbled at

the time of the accident. *Held*, the court ought to have directed a verdict in favor of the company.

## 2. Same — Statute — Construction.

By § 679, C. C. Pro., making the killing or injuring of stock by a railroad company *prima facie* evidence of negligence, it was the design of the legislature to create a presumption of law, not fact. Its only effect is to change the order of proof. It is merely a statute of procedure creating no new liability. Negligence in fact is as much the basis of recovery now as before, and if at the close of the case there is no evidence of negligence there can be no recovery.

(Argued May 21, 1888; reversed May 25, 1888; opinion filed Oct. 10, 1889.)

THIS is an appeal from the district court, Turner county; Hon. C. S. PALMER, Judge.

The action was brought to recover the value of a horse alleged to have been killed by the negligent acts of the defendant, its agents or servants. Upon the trial the plaintiff recovered judgment and the defendant appealed.

*Burton Hanson* and *R. B. Tripp*, for appellant.

The undisputed evidence on the part of the defendant overcame the *prima facie* case of the plaintiff, and established as a matter of law that there had been no neglect of duty by the defendant. The court ought to have directed the verdict. Section 679, C. C. Pro., is merely a provision as to the order of the proof. No greater probative force now attaches upon the whole case from the fact of the killing than before. The purpose was not that the plaintiff might recover on less evidence, but from convenience and possession of the information, the order of its production was changed. It is a statute of procedure merely. The presumption is one of law by virtue of the statute, not of fact. *Spalding v. Chicago & N. R. R. Co.*, 33 Wis. 582; *Kentucky C. R. R. Co. v. Talbot*, 7 Am. & E. R. R. C. 585; *Grundy v. Louisville & N. R. R. Co.*, 2 S. W. Rep. 899.

Plaintiff could recover only in case of willfulness or gross negligence. *Pierce, Railroads*, 402; *Rorer, Railroads*, 1392; *Maynard v. Boston & M. R. R. Co.*, 115 Mass. 458; *Munger v. Tonawanda R. R. Co.*, 4 N. Y. 340; S. C., 5 Denio, 255; *North P. R. R. Co. v. Rehman*, 49 Pa. St. 101; *I. N. C. & L. R. R. Co. v. Horter*, 38 Ind. 558; *Louisville & N. R. R. Co. v. Ballard*, 2

Metc. (Ky.) 177; Price v. N. J. & T. R. R. Co., 32 N. J. L. 19; Atchison, T. & S. F. R. R. Co. v. Beets, 15 Pac. Rep. 821.

The only cause of complaint appears to be the omission to keep a lookout. It was not gross negligence to omit to watch the track. Wallace v. St. Louis, I. M. & S. R. R. Co., 74 Mo. 594. If it be admitted the duty of watchfulness existed, it is not shown that the want of it contributed to the injury.

*J. H. Warner*, for respondent.

The evidence was conflicting, so with the presumption arising from section 679, C. C. Pro., there was no error in the court's submitting the case to the jury. Mares v. N. P. Ry. Co., 21 N. W. Rep. 5; Kaples v. Orth, id. 633; Stoker v. City, id. 557; Carey v. N. P. Ry. Co., 21 id. 479.

SPENCER, J. (*After stating the facts as above.*) This action was brought to recover the value of a certain horse alleged to have been killed by and through the gross negligence of the defendant, its agents and servants.

Upon the trial, the plaintiff proved ownership of the horse; that he was killed in Hutchinson county, this territory, by being run over by defendant's engine and cars; and his value, and rested his case.

The defendant then proved, as a matter of defense, by the engineer, fireman, and brakeman who were in charge of the engine and train at the time the accident occurred, under averments in the answer proper for that purpose, that the accident occurred at a place where there was a down grade; that the train was moving at the rate of from eighteen to twenty miles an hour; that the horse came upon the track on the left side, about five to ten rods in advance of the moving train; that immediately upon seeing the horse the engine was reversed, the brakes applied, whistle blown, and every thing done that was possible to prevent the accident; that the engine and cars were provided with the usual and necessary appliances for running trains of cars, and stopping the same; and that the train hands in charge of such engine and train were experienced men in the business, and competent for the service in which they were engaged. It was also in proof that the horse was hobbled.

Some witnesses were sworn on behalf of the plaintiff in rebuttal, but nothing of consequence was elicited. The facts as testified to by the engineer, fireman, and brakeman were in no way contradicted, or attempted to be; nor was there any evidence tending to show that the engine and train were not properly equipped and managed, or that the accident could have been averted, or that the train could have been stopped, after the horse was first seen on the track, more expeditiously than it was.

This was the condition of the case at the close of the testimony, and thereupon the defendant's counsel moved the court to direct a verdict in favor of the defendant on the ground that the undisputed evidence, as matter of law, disproved any negligence on the part of the defendant, and that there was not any evidence of negligence sufficient to support a verdict against the defendant. The court denied the motion, and the defendant duly excepted. The plaintiff had a verdict, upon which judgment was rendered, and the defendant appealed.

Proof of the killing of the horse by the defendant was sufficient, had the case closed at that point, to have allowed the plaintiff to recover under section 679 of the Code of Civil Procedure. By said section it is provided, in substance, that the killing or damaging of any horses or stock by the cars or locomotives along a railroad shall be *prima facie* evidence of negligence by the railroad company.

We think the design and effect of this statute is to create a presumption in law of the defendant's negligence in the cases specified, but not a presumption of fact. It cannot be presumed that the legislature intended, by this enactment, to make railroad companies liable for negligence or carelessness in cases where all the evidence in the case, taken together, proves, as a matter of fact, that there was no negligence. The effect of the statute is merely to change the order of proof. By it the killing of an animal by a railroad company, in the absence of any other evidence, is sufficient to allow the plaintiff to recover. This compels the company, in the event it desires to escape liability, to prove care on its part; to submit its witnesses to cross-examination; to show to the court that though, by the statute, it is presumed to have been careless because of the injury having occurred, yet that in fact it has

not been guilty of any negligence. If, at the close of the case, it appears from the evidence that the defendant has not been guilty of carelessness; that the injury complained of was, in fact, not occasioned by the negligence or carelessness of the defendant,—there can be no recovery. If the evidence be conflicting; if there be any evidence that tends to prove that the act complained of was the result of negligence on the part of the defendant—then the question is for the jury. The law does not create any new liability. Negligence, in fact, is as much the basis of the right to recover, in such actions, since the enactment of the statute as it was before. Under it the plaintiff has, in the first instance, only to prove the injury, to enable him to recover. The defendant then, if it be able so to do, proves that it was not negligent; that the injury was not occasioned by its carelessness. Having done this, it becomes the duty of the plaintiff to produce evidence tending to prove the defendant was in fact guilty of the negligence complained of. If he fail to do this, he is not entitled to recover. The statute is one of procedure merely; placing upon the defendant, in the first instance, if it desires to avoid payment of the value of the animal killed or injured, the duty of showing that it exercised proper care in the running of its trains to avoid the injury; that the act complained of was not occasioned by its carelessness or negligence. This having been done, the case proceeds as though the statute did not exist, and the case is to be determined upon its merits, under the evidence as to whether the defendant was in fact negligent; and under such circumstances, if there be no evidence of negligence in fact, there can be no recovery.

In the case at bar, the plaintiff having proved the killing, and the defendant having showed that it exercised proper care and precautions to prevent the injury—that it was not negligent—and the plaintiff offering no evidence tending to prove that the horse was in fact killed by defendant's negligence, there was nothing for the jury to determine, and the motion of defendant should have been granted. The question here involved was passed upon by this court in the case of *Volkman v. Railway Co.*, 5 Dak. 69, 37 N. W. Rep. 731, but we have deemed it proper to state somewhat more fully the grounds upon which our decision

proceeded. Grundy v. Railway Co., 2 S. W. Rep. 899; Spaulding v. Railway Co., 33 Wis. 582; Railway Co. v. Talbot, 7 Am. & Eng. R. Cas. 585, — will be found, also, to sustain the view herein expressed. The judgment appealed from must, therefore, be reversed, and a new trial ordered; all the justices concurring.

6	397
1n	313
43*	710
47*	301

**MCLAUREN ET AL., Respondents, v. CITY OF GRAND FORKS ET AL., Appellants.**

**Municipal Corporations — Powers — Local Improvements — Estoppel.**

A city charter provided that when the mayor and council deemed it necessary to grade any street or alley for which a special tax shall be levied, they shall so declare by resolution, which shall be published for four consecutive weeks, and give resident owners of property liable to assessment twenty days within which to protest. The mayor and council without observing any of these provisions graded an alley and issued tax certificates therefor. *Held*, the certificates were void, and that a person by petitioning the council for the improvement was not estopped from questioning the proceedings of the council in issuing the certificates.

(Argued Feb. 17, 1889; affirmed May 25, 1889; opinion filed Oct. 10, 1889.)

**A** PPEAL from the district court, Grand Forks county; Hon. W. B. McCONNELL, Judge.

Action by D. P. McLauren and others against the city of Grand Forks and Jacob S. Eshelman, to have declared void certain tax certificates, and perpetually restrain the defendant from executing and delivering deeds thereupon to the holder of such certificates, on the ground that they were illegally issued. On the trial in the district court the plaintiff had judgment for the relief prayed for, and the defendants appealed.

*A. J. O'Keif*, for appellants.

While appellants do not admit that the tax levy was illegal, yet assuming it was, the respondents are estopped from questioning it. 2 Herman, Estop. 1221, 1362; City v. Gilbert, 31 Ia. 364, 59 Am. Rep. 1; Motz v. Detroit, 18 Mich. 496; Brown v. Bowen, 30 N. Y. 519; State v. Trenton, 39 N. J. L. 499; Swift v. Williamsburg, 24 Barb. 42; Sexton v. Smith, 32 Wis. 299;

Frost v. Flick, 1 Dak. 132; 6 Wait, A. & D. 706; Quinlan v. Myers, 29 Ohio St. 500; People v. Goodwin, 1 Seld. 573; Kellog v. Ely, 15 Ohio St. 66.

The council was nothing more nor less than the agents of these property-owners in making the improvements. Lake v. Trustees, 4 Denio, 520; Bond v. Mayor, 19 N. J. Eq. 376; 4 Wait, A. & D. 605; West v. Ballard, 32 Wis. 137; Linton v. Mayor, 53 Ga. 588; Greene v. Munford, 5 R. I. 472; Clinton Appeal, 56 Pa. St. 315; 3 Wait, A. & D. 702; Challis v. Commissioners, 15 Kan. 49.

The only thing complained of is alleged irregularity in the proceedings. This being so, and having known of the improvements being made, those not signing the petition as well as the ones that did, will not now be permitted to question them. Warden v. Supervisors, 14 Wis. 618; Converse v. Ketchum, 18 id. 202; Mitchell v. Milwaukee, id. 92; Bond v. Kenosha, 17 id. 284; Kellog v. Oshkosh, 14 id. 623; Cooley, Tax. 573; 2 Desty, Tax. 75, 666, 1244; High, Inj. 464, 465; Baker v. Omaha, 20 N. W. Rep. 382; LaFayette v. Fowler, 34 Ind. 140; Sleeper v. Bulleu, 6 Kan. 300; Evansville v. Pfisterer, 34 Ind. 36; Weber v. San Francisco, 1 Cal. 455; Tash v. Adams, 10 Cush. 252; Peoria v. Kidder, 26 Ill. 351; 30 N. W. Rep. 177.

*C. B. Pratt*, for respondent.

The council having failed to comply with the charter the proceedings were void. Doughty v. Hope, 3 Denio, 594; Sharpe v. Speir, 4 Hill, 76; Sharpe v. Johnson, id. 92; Hopkins v. Mason, 42 How. Pr. 115; Merritt v. Village, 71 N. Y. 309; Hoyt v. City, 2 Am. Rep. 76; White v. Stevens, 34 N. W. Rep. 255; Zottman v. City, 29 Cal. 96; Murphy v. Louisville, 9 Bush, 189; Hewes v. Rice, 40 Cal. 255; 2 Dillon, Mnn. Corp., § 769, n. 1; Pound v. Chippewa, 43 Wis. 63; Massing v. Ames, 37 Wis. 645.

The contention that respondents are estopped to question the validity of the proceedings is not well taken. The council could acquire jurisdiction in no such manner. Martin v. Zellerbach, 38 Cal. 300; Hoyt v. City, *supra*; Petition of Sharp, 15 Am. Rep. 415; Tones v. City, 3 Am. & Eng. O. C. 644; Sleckett v. City, 22 Mich. 104.



SPENCER, J. The facts in this case are undisputed. The plaintiffs were the owners of certain real estate situated on Kittson avenue, a street in the city of Grand Forks. In May, 1882, the plaintiffs joined in a petition which was duly presented to the city council of Grand Forks, praying that Kittson avenue be graded. Such proceedings were had by the mayor and city council that such street was graded, the contract therefor having been awarded to the defendant Eshelman, who performed the work. Special-tax certificates were issued against the lots of the plaintiffs abutting on such street, and are now owned by the defendant Eshelman.

It is provided by the city charter of the city of Grand Forks, in substance, that when the mayor and council shall deem it necessary to grade any street, alley, etc., within the limits of the city, for which a special tax shall be levied, the mayor and council shall, by resolution, declare such work and improvement necessary to be done, and shall publish such resolution for four consecutive weeks, and give the resident owners of the property liable to be assessed and taxed for such improvement twenty days in which to protest against such improvement.

The defendant in this case, the mayor and council of the city of Grand Forks, performed none of these things, and by reason of this omission or neglect it is claimed by the plaintiff that the proceedings in regard to the grading of Kittson avenue were illegal, and the special-tax certificates, issued for the purpose of providing means for payment of the expenses thereof, utterly void. The city council only had such authority as was conferred by the charter of said city, and could exercise the powers granted only in the manner and according to the conditions imposed by the law. They only had jurisdiction to act and bind the city by what they did while acting within the provisions of the law authorizing them to act at all. Except in the instances provided by the charter itself the officers of the city itself were powerless to legally grade the street. The charter provides that when the mayor and council shall deem it necessary to grade any street they shall declare by resolution that the grading of such street is necessary. It is only when necessary that the law contemplates such improvements shall be made, and whether or not the proposed improvement is necessary is to be determined by the mayor and council,

and such determination is to be evidenced by a resolution to that effect. Until this is done they have no power to act, and are without jurisdiction in the premises. The law-making body evidently intended that before the mayor and council entered upon making improvements on behalf of the city, for the expense of which private property was to be burdened, the necessity therefor should be considered and determined by them in their official capacity, and the evidence preserved by proper records. This is an important provision prescribing the preliminary steps necessary when it proposed to make public improvements, and, if disregarded or omitted, all subsequent proceedings are invalid, and of no effect. *Hoyt v. City of Saginaw*, 2 Am. Rep. 76; *White v. Stevens*, 34 N. W. Rep. 255.

The other conditions imposed by the statute are equally important, and necessary of performance. It having been determined that the proposed improvement is necessary, the resolution so declaring is to be published for a stated period, and within a limited time thereafter, defined by the charter, the owners of the property liable to assessment for the expenses of such improvement may protest against it.

These provisions of the charter were intended to preserve to the owners of property to be affected by the proposed improvement the right for any reason they may have to protest against the making of it, and to demonstrate that it was not necessary; that the benefits which would flow from it were not commensurate with its costs, etc.

The giving of the notice required by law was a step essential to be taken by the city authorities before they could legally enter upon the work of making the improvement. It was jurisdictional. All the powers the mayor and council possessed in regard to making public improvements were derived from the charter of the defendant. They could only exercise these powers when acting in conformity with the law, and observing and performing all of the conditions imposed by it, and substantially in the manner provided.

In this proceeding the provision of the law defining upon what conditions the proposed improvement might be made was utterly ignored, and the rights of the owners of property affected entirely

disregarded. The proceedings of the city authorities were, therefore, illegal, and the tax certificates issued against the lots representing the expenses of such improvement, and all proceedings under them, were void. *Hewes v. Reis*, 40 Cal. 255; *Pound v. Chippewa Co.*, 43 Wis. 63; 2 Dill. Mun. Corp., § 769.

The object of this law was to provide a method where, under certain specified conditions, private property may be assessed and taxed for the payment of the expenses of necessary public improvements. Such statutes are in derogation of the common law, and must be construed strictly, and the conditions imposed observed and performed specifically. The omission of any of them is fatal to the legality of all proceedings attempted to be had under it. *Merritt v. Village of Port Chester*, 71 N. Y. 309; *Doughty v. Hope*, 3 Den. 594; *Sharp v. Johnson*, 4 Hill, 92.

Nor are the plaintiffs estopped from taking advantage of the invalidity of the tax certificates, or the illegality of the proceedings. They did not by merely petitioning the council to grade the street waive the rights which they had under the statute; they did not assume to do so in their petition; they asked simply that the street be graded. It is not to be presumed that by such request they intended that such improvement should be made without reference to the provision of the law under which it could only be made legally. On the contrary, the presumption, if any could be indulged in, or was necessary, would be that the defendants should take such proceedings as were necessary under the law to be done for the grading of the street, not that the law be disregarded. *In re Sharp*, 15 Am. Rep. 415; *Tone v. Columbus*, 3 Am. & Eng. Corp. Cas. 644; *Steckert v. City of Saginaw*, 22 Mich. 104; *Martin v. Zellerbach*, 38 Cal. 300.

We find no error in the record, and the judgment appealed from must, therefore, be affirmed. All the justices concurring excepting McCONNELL J., not sitting. Judgment affirmed, with costs.

NATIONAL G. A. BANK, Appellant, v. RAYMAN, Respondent.

**Poor Debtors — Examination and Discharge — Appeal — Review.**

With reference to the examination and discharge of persons confined in jail on civil process, § 5547, Comp. L., provides that, "if upon such examination the judge before whom the same is held, shall be satisfied the prisoner is entitled to his discharge, he shall administer to him" the statutory oath. Under this section when an order of discharge has been made upon conflicting evidence, the only exception being to the final order, the supreme court cannot examine the evidence for the purpose of ascertaining whether a different conclusion might not have been reached. In such a case the only inquiry is, is the order supported by any competent evidence? If it is, it must be affirmed, otherwise, reversed. CARLAND, ROSE and TEMPLETON, JJ., dissenting.

(Argued Feb. 5, 1889; affirmed Feb. 19, 1889; opinion filed Oct. 10, 1889.)

**A**PPEAL from an order of the judge of the third judicial district discharging the respondent from imprisonment on execution in a civil action.

*Ball, Wallin & Smith*, for respondent.

The conclusions of fact drawn by appellant from the evidence are erroneous.

The question as to whether or not it appeared upon respondent's examination that he had disposed of property "with a design to secure the same to his own use, to hinder, delay or defraud creditors," is not reviewable here. *Petition of Haywood*, 10 Pick. 358; *Cannon v. Sevino* (Me.), 4 Atl. Rep. 789; C. C. Pro., § 725.

An examination of appellant's authorities shows them distinguishable from the case at bar.

*D. H. Twomey and J. B. & W. H. Sanborn*, for appellant.

The appellant complains that the respondent was discharged when it clearly appeared from the examination that he had conveyed, concealed and disposed of large amounts of his property, with the design to secure the same to his use, to hinder, delay and defraud his creditors. This state of facts conclusively appears from the record.

He could not truthfully take the oath prescribed by section 725, C. C. Pro. The order discharging him was erroneous. *Marr v. Clark*, 56 Me. 542, 545; *Little v. Cochran*, 24 id. 509; *Ledden*

v. Hanson, 39 id. 357; Rev. St. Maine, 1883, p. 849, § 30; In Matter of Watson, 2 E. D. Smith, 229, 429, 436; Matter of Brady, 69 N. Y. 215, 218; Matter of Brady, 8 Hun, 437; Matter of Fowler, 8 Daly, 548; People v. White, 14 How. Pr. 500; Maas v. La Torr, 6 Abb. Pr. (N. S.) 219; Bullymoore v. Cooper, 46 N. Y. 246, 248; In re Fitzgerald, 8 Daly, 188; Duckerhoff v. Ahlborn, 2 Abb. N. C. 373; Maas v. O'Brien, 14 Hun, 95; Gitske v. Brooks, 40 How. Pr. 165; Reford v. Cramer, 1 Vroom, 250; Rev. St. N. J., p. 499, §§ 9, 11, 15; Fletcher v. Bartlett, 10 Gray, 491; Dennis' Case, 110 Mass. 18; Morory's Case, 112 id. 394; Public St. Mass., p. 946, § 29; *Ex parte* McClenachan, 2 Yates (Penn.), 502; Purdon's Digest, p. 510, §§ 20, 21; p. 38, § 63; Bunker v. Nutter, 9 N. H. 557.

It was claimed below and held, that the respondent was entitled to his discharge upon a showing of his inability to pay the judgment, although the facts were that he had concealed, conveyed away, or disposed of \$50,000 of his property with a design to secure the same to his use, to hinder, delay or defraud his creditors. It was urged in support of this, that to hold otherwise would result in the perpetual imprisonment of a debtor. This position is unsound: (1) Under the authorities. (2) Upon the reading of the statute itself. (3) Upon principles of public policy.

SPENOER, J. The defendant was arrested upon an order of arrest issued in this action, before judgment, under the provisions of § 149, chap. 11, Code Civ. Proc. (§ 4945, Comp. Laws), on the ground that he had fraudulently contracted the debt sued upon, and had disposed of his property with intent to defraud his creditors. Judgment having been recovered in the action, and execution against his property having been returned unsatisfied, he was arrested and imprisoned by virtue of an execution issued against his person. Thereupon he applied for his discharge, under the provisions of the Code of Civil Procedure in regard to "relief of persons confined in jail on civil process" (§§ 721-727, Code Civ. Proc.; §§ 5543-5549, Comp. Laws), and an order was duly made and entered for his examination. He was examined and cross-examined, as were also witnesses called by either party; the parties, respectively, appearing by attorney. Upon the close

of the examination, the defendant's counsel moved that defendant be permitted to take the oath provided by the statute, and be thereupon discharged from further imprisonment. To this the plaintiff objected, on the ground that the evidence showed that he had fraudulently disposed of his property with intent to defraud his creditors, and had failed to account for a large portion of his property, and had concealed property with intent to secure it to his use, and that the evidence was insufficient to sustain a decision permitting the oath to be administered to the defendant and directing him to be discharged, and that the oath, if taken, would be untrue. The court overruled the objection of plaintiff, and administered the oath to the defendant, and directed his discharge from further imprisonment under said execution. To this ruling and decision the plaintiff excepted. No other exceptions appear in the record.

By section 5547 of the Compiled Laws it is provided that "if, upon such examination, the judge before whom the same is held shall be satisfied that the prisoner is entitled to his discharge, he shall administer to him the following oath, to-wit: 'I do solemnly swear (or affirm) that I have not any estate, real or personal, to the amount of ten dollars, except as by law is exempt from levy and sale on execution, and that I have not any other estate, nor have I conveyed, concealed, or in any way disposed of my property, real or personal, with design to secure the same to my use, to hinder or delay or defraud my creditors. So help me God.'"

Under this provision of the law, if the judge, upon the evidence adduced upon the examination, shall be judicially satisfied that the prisoner can truthfully take such oath, he is to administer it to him, and discharge him from further confinement.

The examination is in the nature of a trial, and the judge acts judicially.

The evident design of the law, in regard to the confinement of persons on execution against the person in civil causes, is to furnish judgment creditors, in the instances specified in section 4945 of the Compiled Laws, extraordinary remedies for the recovery of their debts. The judgment creditor, in the cases specified, may deprive his debtor of his liberty until he satisfies the tribunal provided for that purpose that he has not any property exceeding \$10 in value exempt from execution, and that he has not concealed or

otherwise disposed of any of his property with design to secure to his use, to hinder or delay or defraud his creditors. In the cases specified he is subject to imprisonment at the mere will of his creditor, and may be released by him at his pleasure. The judge may also order his discharge from confinement where, after examination, he shall be satisfied of his honesty.

In the case at bar, the judge, after hearing all the evidence, was satisfied that the defendant could take the oath provided by the law in such cases, and he administered it to him, and ordered his discharge. The evidence was very full. No objections or exceptions were taken to any part of it, so far as the record discloses.

This court cannot examine the evidence for the purpose of ascertaining whether, as a matter of fact, a different conclusion from that arrived at in the district court, or before the district judge, would have been proper, or a different conclusion might have been reached; but only so far as to ascertain whether or not errors of law were committed in the trial court upon exceptions properly taken — whether the trial court exercised an unreasonable or unjust discretion.

The judge, having the power, under the law, to order the discharge of the prisoner, if he was satisfied from the examination that he was entitled to it, made such order. The exception to his decision in this regard presents the only question, viz.: Was there, as a matter of law, sufficient evidence to sustain his finding?

The evidence was somewhat conflicting, and from it it is not improbable that different persons would arrive at different conclusions. But this forms no reason in law for the reversal by this court of the finding of fact of the trial judge. This court is not authorized to make other or different findings of fact, nor are we at liberty to examine the record for the purpose of determining whether a state of facts, the converse of those found, might not have been arrived at, but only to ascertain whether the facts as found are supported by any competent evidence. For this purpose we have examined the record, and are of the opinion that the evidence is sufficient to sustain the conclusions arrived at by the trial judge, and that he committed no error. The judgment of the district judge must, therefore, be affirmed. All of the justices concurring, excepting CARLAND, ROSE and TEMPLETON, JJ., dissenting. Judgment affirmed.



6	406
1n	466
43*	715
48*	338

**McLAUGHLIN ET AL., Respondents, v. FIRST NATIONAL BANK OF DEADWOOD, Appellants.**

**1. Banks and Banking — Deposits — Ownership — Parties — Real Party in Interest.**

Where a bank receives money from a party and opens an account with him in his name, it is bound to honor his checks to the extent of his deposit. It will not be permitted to show title in another not a party and making no claim to the fund. So, one depositing money as "agent," subject to his checks or orders, may maintain an action against the bank for the money in his own name, or he may assign his interest therein and the assignee maintain the action in his name.

**2. Same — Trustee of an Express Trust.**

Such a depositor is also a trustee of an express trust within the meaning of § 76, C. C. Pro., which provides that such trustee includes "a person with whom, or in whose name, a contract is made for the benefit of another," and he could sue alone.

**3. Intervention, Right of.**

Where a receiver was permitted to intervene in an action, but it appeared the company for which he was receiver had assigned away all its interest in the fund in controversy prior to his appointment, *held*, he had no claim as against the assignee.

(Argued Oct. 12, 1888; affirmed Oct. 19, 1888; opinion filed Oct. 10, 1889.)

**A** PPEAL from the district court, Lawrence county; Hon. CHAS. M. THOMAS, Judge.

Action by Daniel McLaughlin and William R. Steele, substituted for Ambrose G. Bierce, against the First National Bank of Deadwood, to recover the amount of a certain balance alleged to be due plaintiffs, as assignees of Bierce, on account of moneys deposited. Samuel Cushman, receiver of the plaintiffs' assignor, the Black Hills Placer Mining Company, filed a complaint in intervention. Verdict for plaintiffs, and defendant and the intervenor appeal.

*G. C. Moody*, for appellant.

The evidence clearly establishes that the former plaintiff, Bierce, acted solely as a mere agent of the Black Hills Placer Mining Company. The money at no time belonged to him, but to the company. He was not the real party in interest (§ 74, C. C. Pro.), nor was he a trustee of an express trust under section 76.

The contract sued on is an implied contract, not an express one. As to what constitutes the real party in interest, see *Hoagland v. Van Etten*, 35 N. W. Rep. 869; *Pomeroy, Remedies* (2d Ed.), §§ 172, 173, 174; *Palmer v. Ft. Plain R. R. Co.*, 11 N. Y. 376; *Ruckman v. Pitcher*, 20 id. 9; *People v. Booth*, 32 id. 397; *Sanford v. Sanford*, 45 id. 723; *Hays v. Hathorn*, 74 id. 486; *People v. Ingersoll*, 58 id. 1; *Tracy v. Snyder*, 50 Ia. 73; *Swift v. Ellsworth*, 10 Ind. 205; *Lawrence v. Long*, 18 id. 301; *Rawlings v. Fuller*, 31 id. 255; *Mendenhall v. Baylies*, 47 id. 575; *Claffin v. Dawson*, 58 id. 408; *Smock v. Brush*, 62 id. 156, 176; *Frazier v. Erie Bank*, 8 W. & S. 18; *Swift v. Swift*, 48 Cal. 268; *People v. Haggin*, 57 id. 579; *Robbins v. Deverill*, 20 Wis. 142; *King v. Cutts*, 24 id. 625; *Rock Co. v. Hollister*, 21 Minn. 385; *Third National Bank v. Clark*, 23 id. 267; *Bostwich v. Bryant*, 16 N. E. Rep. 378; *Chin Kem Yon v. Ah Joan*, 16 Pac. Rep. 705.

*Van Cise & Wilson*, for intervenor.

This was a proper case for intervention. The complaint was sufficient. C. C. Pro., § 90; *Gradwohl v. Harris*, 29 Cal. 150; *Coghill v. Marks*, id. 673; *Davis v. Eppinger*, 18 id. 378; *Speyer v. Thorels*, 21 id. 280; *Stich v. Dickinson*, 38 id. 608; 3 *Estee* (2d Ed.), 190, 192; *Howe v. Jones*, 8 N. W. Rep. 451; *Wetmore v. McMillan*, 10 id. 725; *Mower's Appeal*, 12 id. 646; *Martin v. Thompson*, 63 Cal. 3; *Dunham v. Greenbaum*, 56 Ia. 303; *Tuttle v. Wheaton*, 57 id. 304; *Coffey v. Greenfield*, 55 Cal. 382.

*McLaughlin & Steele*, for respondent.

It is sufficient for the contention that Bierce was the real party in interest; that the defendant bank is estopped by its own acts from questioning his ownership of the money. *Bank v. Mason*, 95 Pa. St. 113, 40 Am. Rep. 632; *Davis v. Smith*, 12 N. W. Rep. 531; *Lunn v. Seaman's Bank*, 37 Barb. 129; *Jordan v. N. S. & L. Bank*, 74 N. Y. 467; *Sinclair v. Murphy*, 14 Mich. 362; *National Bank v. Insurance Company*, 104 U. S. 54; *Bank v. Lanier*, 11 Wall. 379; *Wood v. Boylston Nat. Bank*, 129 Mass. 358, 37 Am. Rep. 366; 29 Minn. 201; *Morse*, 29, 247, 453.

The relation of debtor and creditor exists between a bank and its

customers. As soon as the money is paid in it becomes the property of the bank. *Morse*, 25, 453; *Marine Bank v. Fulton Bank*, 2 Wall. 252; *Bank v. Millard*, 10 id. 155; *Thompson v. Riggs*, 5 id. 663; *Etta Nat'l Bk. v. 4th Nat'l Bk.*, 46 N. Y. 82; *Chapman v. White*, 6 id. 412.

Aside from these considerations, Bierce was *the* real party in interest. He had an interest in the fund, to account for it to his principal.

A person with whom a contract is made for the benefit of another may sue without joining with him the person for whose benefit the action is prosecuted. C. C. Pro., § 76; 1 Wait Pr. 95, 96; *Considerant v. Brisbane*, 22 N. Y. 389; *Freeman v. Fulton Fire Ins. Co.*, 14 Abb. 398; *Riley v. Cook*, 13 id. 255, 22 How. Pr. 93; *Brown v. Cherry*, 38 id. 352; *Davis v. Reynolds*, 48 id. 210; *Kellogg v. Sweeney*, 56 Barb. 635; *Swift v. Swift*, 46 Cal. 217; *Erickson v. Compton*, 6 How. Pr. 471; *Morgan v. Reed*, 7 Abb. 215; *Union Rubber Co. v. Tomlinson*, 1 E. D. Smith, 364; *Pomeroy*, § 177; *Bliss*, §§ 52, 57.

The complaint of the intervenor did not state facts sufficient to constitute a cause of action in favor of the receiver, intervenor, or to allow the right of intervention. *Gale v. Shillock*, 30 N. W. Rep. 138; *Lewis v. Lewis*, 10 id. 586; *Howe v. Volcano Water Co.*, 13 Cal. 62; *Harlan v. Eureka Mining Co.*, 10 Nev. 94; *Hinds v. C. & N. F. R. R. Co.*, 10 How. Pr. 483; *French Bank Case*, 53 Cal. 495.

SPENCER, J. In the complaint it is alleged that between July 10, 1880, and August 31st following, one Ambrose G. Bierce, the assignor of these plaintiffs, at the city of Deadwood, became a customer and depositor of said defendant; and that said defendant, between those days, received from the said Bierce, for his use and benefit, various sums of money, amounting in the aggregate to about the sum of \$79,000, and gave him credit for the same upon its books, subject to the checks, drafts, and orders of said Bierce. That defendant paid upon the checks and orders of said Bierce all of the funds so deposited and credited to him, except the sum of \$3,473.05, which said defendant refused to pay to him, or upon his checks or orders. That on September 21, 1880,

said Bierce duly commenced an action in the district court of Lawrence county against the said defendant to recover such sum; and that while said action was pending and undetermined, and on the 17th day of April, 1884, said Bierce, for a valuable consideration, duly assigned and transferred to the plaintiffs, for the use of the Black Hills Placer Mining Company, all his right and interest in and to said cause of action and said fund; and that on the 17th day of January, 1884, said company also transferred all its right and interest in and to said claim, demand, and cause of action, to the plaintiffs, who have since remained the owners of the same. The answer of the defendant bank is, in substance, that the moneys alleged by the plaintiffs to have been deposited with it were in fact moneys of said Black Hills Placer Mining Company; that one Ichabod M. West was the agent of said company, and that said company, through its said agent, carried on a general banking business with said defendant; that July 1, 1880, said company became indebted to said defendant in the sum of \$3,473.05 on account of its overdrafts on said defendant, made by and through its said agent West, and that the moneys which plaintiffs claim were received and retained by it in payment of such overdraft. One Samuel Cushman having been appointed receiver in proceedings supplementary to execution on a judgment recovered against said Black Hills Placer Mining Company, was permitted to intervene in said action, and filed an answer therein, in effect that said moneys so deposited by said Bierce were not his, but were the moneys of said Black Hills Placer Mining Company, and belonged to said intervenor as receiver of said company. Upon the trial it was proved, among other things, that Bierce was general agent of the said Black Hills Placer Mining Company; that the moneys thus deposited with defendant were received from such company, and deposited to the credit of said A. G. Bierce, agent, and were subject to his check and order; that the account was kept by defendant in the name of A. G. Bierce, agent, and that his checks and drafts so signed were honored and paid by the defendant until such fund was reduced to the sum of \$3,473.05, when the payment of further checks or of this money was refused, the defendant claiming the right to retain the same in payment of an overdraft which was alleged had been made by

said company through said West, alleged by the defendant to have been agent for said company before the appointment of said Bierce. Upon the trial of the action the jury returned a verdict in favor of the plaintiff upon all the issues, and judgment was duly entered in accordance therewith.

Assuming, therefore, as we must, from the verdict in the case, that all the material allegations in the complaint are true, the question presented for our determination on this appeal is whether the original plaintiff, Ambrose G. Bierce, had sufficient interest in the fund to maintain this suit in his own name; and, if he did have such interest, could he transfer it in such manner that his assignees may maintain such action?

Bierce was the general agent of the company, and the fund in dispute was deposited by or for him, or his use, in his name as "agent," and was subject to his check or order. By accepting this deposit in this form, the defendant assumed the obligation of paying the checks properly signed by the person in whose name or to whose credit the deposit was made, so long as a credit sufficient for that purpose remained.

Deposits in a bank create between it and the depositor, or the person to whom the credit for the deposit is given, the relation of debtor and creditor. *Bank v. Hughes*, 17 Wend. 100; *Bank v. Bank*, 46 N. Y. 82. So, also, where a bank receives money from a person, and gives him credit therefor in his own name, it is in duty bound to honor his checks and orders to the amount of such deposit, and it cannot refuse to honor his drafts against the fund on the ground that the money deposited belonged to some other person. In such a case the claim of the depositor is a chose in action, and not in bailment. *Chapman v. White*, 6 N. Y. 412. And the bank cannot set up as a defense against the depositor that his title to the money deposited is defective or in another. That is a matter in which the bank is not interested until the third party who claims to own the fund shall proceed to enforce his rights.

When a bank receives money from a person, and opens an account in his name, and credits him with funds received, it is bound to honor his checks to the extent of the fund. It cannot defend on the ground that the title is in another, who is not a

party and makes no claim. It is estopped, under such circumstances, from questioning the title of the depositor. *Bank v. Mason*, 95 Pa. St. 113; *Lund v. Bank*, 37 Barb. 129; *Bank v. Insurance Co.*, 104 U. S. 54.

Whether a different rule would apply in the event it was shown the bank had a set-off or counter-claim against the actual owner, though the deposit was made in the name of another, we are not called upon to consider in this case, as the jury have determined by their verdict that the defendant had no demand against the alleged actual owner; that the overdraft was the debt of West individually, and not of the company.

We are of the opinion, also, that Bierce had sufficient interest in the fund to maintain this action in his own name as the trustee of an express trust. Code, § 74, provides "that every action must be prosecuted in the name of the real party in interest," except as otherwise provided in section 76, which is as follows: "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute may sue without joining with him the person for whose benefit the action is prosecuted; and the trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another."

Conceding that Bierce was not the real party in interest, yet it cannot be doubted that he was the general agent of the company. Whatever contract was made with the defendant in regard to the deposit of this fund was made with him, and in his name. The cashier of the defendant, with whom this business was transacted, was a witness on the part of the defendant, and testified "that at the time he [Bierce] was making the negotiations, and at the time that he made the deposit, I didn't ask him his authority as general agent of the company. He deposited so much money as agent, and left his signature as to how he would sign. It was not my business to inquire into his authority for checking out the money he had deposited in that way." The money was deposited to Bierce's credit as agent, subject to his check, and was so understood by the defendant and its clerks, and drafts so drawn were honored by the defendant. The contract was, therefore, with him, and it was so treated by both parties. As to the defendant, at least, the legal

title of the funds was in Bierce, and he was entitled to a performance of the contract by the bank.

Before the adoption of these sections of the Code, contracts of this character were enforceable in the name of the person with whom made, who had the legal title by the terms of the contract, as Bierce had here; and this was so whether or not the fact of agency appeared upon the face of the contract. "Written express contracts by or with agents contracting in their own names, with or without a description of agency, were not exceptions to the rule. Such a contract was with an agent, and in his name, when executed by or to him in his individual name, without expressing the agency, though the other party knew he was acting as agent in the transaction, and contracted with him in that capacity; and it was equally with him, and in his name, though he was described as agent on its face when negotiated with him, and by its terms to be performed by or to him." The work of agency might, for convenience, be rejected as descriptive of the person merely. *Considerant v. Brisbane*, 22 N. Y. 389-393. The payee of a note taken by him as agent, merely, of the person to whom the debt represented by it was due, could maintain an action on it in favor of himself. *Buffum v. Chadwick*, 8 Mass. 103. In *Sargent v. Morris*, 3 Barn. & Ald. 277, the rule was stated in this language: "If an agent acts for me and on my behalf, but in his own name, then, inasmuch as he is the person with whom the contract is made, it is no answer to an action in his name to say that he is merely an agent, unless you can also show that he is prohibited from carrying on that action by the person on whose behalf the contract was made."

The action might be maintained by the agent when the promise was to him. The promise in the case at bar was to Bierce; and whether the word "agent" is to be considered as mere description of the person, or as indicating that he is acting in a representative capacity for another, his right to maintain the action is not defeated. In the former instance, the promise was to him individually; and in the latter, the promise was to him, and with him, for the benefit of another, and necessarily involves a trust, and brings him within the purview of the statute.

Had the account with defendant been opened and kept in the



name of Bierce, with the word "agent" omitted, it will not be disputed that the action would have been maintainable in his name; nor can it be doubted that, had the condition been stated that the money was to be paid to him in trust for the company that he represented, the case would have fallen within the statute, and the action have been maintainable in his name. The object of the legislature, by the enactment of these provisions, was evidently to preserve the right of action in all cases of express trusts; and this, whether the trust was declared in the instrument, or was necessarily to be inferred from it.

Before the enactments of sections 74 and 76 of the Code, this action must have been enforced in the name of the plaintiff; and we think it clear that the former plaintiff, Bierce, falls within the description of persons who are to be considered as trustees of express trusts, within the meaning of these sections of the Code. Bliss, Code Pl., §§ 52-57; Reilly v. Cook, 13 Abb. Pr. 255; Considerant v. Brisbane, *supra*; Brown v. Cherry, 56 Barb. 635; Pom. Rem., §§ 174, 175.

We are also of opinion that the promise of defendant, being a chose in action, was assignable by Bierce, and that the present plaintiffs were properly substituted. The payment of a check for the amount claimed, drawn by Bierce in the usual form of the checks made by him, would have extinguished the defendant's debt and liability. If made payable to the order of the plaintiffs by Bierce, and paid to them, it would also have discharged the obligation. The assignment by him to them, and payment to them thereafter, will have like effect.

As to the intervenor, it is perhaps sufficient to say that the undisputed evidence discloses that, before the judgment was recovered in the action in which he was appointed receiver of the effects of the Black Hills Placer Mining Company, the said company had assigned to these plaintiffs all its right and interest to the fund in suit, with power and authority to sue for and collect the same. Their title, therefore, was superior to that of the intervenor. Civil Code Dak., § 2020; Bostwick v. Menck, 40 N. Y. 383.

The verdict was irregular in some respects, but not ambiguous. It found upon all the issues, and was sufficient to support the judg-

ment as entered. *Pitkins v. Johnson*, 2 S. W. Rep. 459 ; *Insurance Co. v. Wright*, 22 Ill. 462.

The judgment must be affirmed. All the justices concurring, excepting THOMAS, J., not sitting. Judgment affirmed.

6	414
6	432
48*	941
48*	947

### STRAW ET AL., Respondents, v. JENKS, Appellant.

#### 1. Assignment for Benefit of Creditors, What Constitutes — Chattel Mortgages.

Where an insolvent firm gave some of its creditors mortgages on its entire stock in trade, all of the mortgages being executed within a few minutes of each other and their amount far in excess of the value of the goods, and permitted the mortgagors to take immediate possession of the property, *held*, that the transaction constituted an assignment whereby it was sought to prefer creditors and was prohibited by § 2027, C. C., which provides that an insolvent may make an assignment for the benefit of his creditors, “ provided \* \* \* that such assignment shall not be valid if it be upon, or contain any trust or condition by which any creditor is to receive a preference or priority over any other creditor; but in such case the property of the insolvent becomes a trust fund to be administered in equity.”

#### 2. Same — Rights of Creditors.

While the execution of the mortgages in such case constituted an invalid assignment, still, their having been given to secure *bona fide* debts, there was no such a fraudulent disposition of the firm's property as would authorize the other creditors to attach it. The mortgages operated to divest the firm of its title, and the mortgagees held it in trust under the statute for the benefit of all of the creditors.

#### 3. Same.

Where an insolvent makes a general disposition of all of his property and abandons his business, or puts himself in such a position it is impossible to continue the business, he has made a voluntary assignment within the meaning of the statute, and it matters not the character of the instrument or instruments used to effect the object. The purpose of the statute is to prevent preferences, and it should receive such a construction as will effect that object.

#### 4. Damages, Measure of — Conversion of Mortgaged Chattels.

In an action by a second mortgagee against a sheriff to recover for the conversion of the mortgaged chattels, where the first mortgagee had recovered what was due him on account of the conversion, the second mortgagee's recovery should be limited to the difference between the value of the chattels and the prior recovery where the value is less than the amount of the two mortgages.

(Argued May 27, 1889; determined and opinion filed October 10, 1889.)

**A**PPEAL from the district court, Grand Forks county; Hon. W. B. McCONNELL, Judge.

Action by mortgagees to recover damages for conversion of mortgaged property. The alleged conversion consisted in defendant, who was sheriff, levying certain warrants of attachment against the mortgagors upon the mortgaged property, which had been taken possession of by the mortgagees. Defense, that the mortgagors were insolvent, and that the mortgage constituted an assignment for the benefit of creditors, and was void, because it preferred the mortgagees, plaintiffs, to the exclusion of other creditors.

*Stone & Seuman, Noyes & Noyes, A. W. Bangs and Moses & Newman*, for appellant.

The respondents in any event cannot recover more than the difference between the value of the goods in question, and the judgment obtained against the defendant by the first mortgagee. C. C. 1970; *Keith v. Haggart*, 33 N. W. Rep. 465.

The mortgage was void for the reason it was a transfer in trust, of the entire property of the firm, who were insolvent, for the benefit of a part of their creditors and amounted to an assignment of all their property in trust, for the benefit of a portion of the creditors. *Martin v. Haussman*, 14 Fed. Rep. 160; *Kellogg v. Richardson*, 19 id. 72; *Clapp v. Dittman*, 21 id. 15; *Perry v. Corby*, 21 id. 737; *Kerbs v. Ewing*, 22 id. 693; *Clapp v. Nordmeyer*, 25 id. 72; *Freund v. Yaegerman*, 26 id. 812; *State v. Moss*, 27 id. 262; *Weil v. Pollock*, 30 id. 813; *Crow v. Beardsley*, 68 Mo. 435; *State v. Benoist*, 37 id. 501; *Sexton v. Anderson*, 95 id. 382; *Downing v. Kintzing*, 2 S. & R. 326; *Van Vleet v. Slawson*, 47 Barb. 317; *Holt v. Bancroft*, 30 Ala. 200; *Livermore v. McNair*, 34 N. J. Eq. 478; *Watson v. Bagaley*, 12 Pa. St. 164; *Miners' National Bank Appeal*, 57 id. 193; *Burrows v. Lehndorf*, 8 Ia. 96; *Cole v. Dealham*, 13 id. 551; *Van Patten v. Burr*, 52 id. 518; *Heineman v. Hart*, 55 Mich. 64; *Harkrader v. Lieby*, 4 Ohio St. 602; *Dickson v. Rawson*, 5 id. 224; *Englebert v. Blanjot*, 2 Whart. 340; *Mussey v. Noyes*, 26 Vt. 471; *Thompson v. Heffner*, 11 Bush, 359; *Perry v. Holden*, 22 Pick.

269; *Bonns v. Carter*, 20 Neb. 566; *Danner v. Brewer*, 69 Ala. 191; *Winner v. Hoyt*, 66 Wis. 227; *Page v. Smith*, 24 id. 368; *Wilks v. Walker*, 22 S. C. 108; *Fruitt v. Caldwell*, 3 Minn. 364; *Murphy v. Caldwell*, 50 Ala. 461; *Owen v. Aris*, 26 N. J. Law, 22; *Wallace v. Wainright*, 87 Pa. St. 263; *Johnson's Appeal*, 103 id. 378; *Taylor v. Taylor*, 78 Ky. 470; *Gage v. Parry*, 69 Ia. 605; *Burrill, Assignments* (4th Ed.), § 128; *Lewin, Trusts*, 509; *Preston v. Spaulding*, 120 Ill. 208; C. C., § 2027; Pen. C., § 637; *White v. Cotzhausen*, 9 Sup. Ct. Rep. 309.

The mortgage being void as a general assignment, the assets became a trust fund to be distributed in equity among all the creditors; but until taken into the actual custody, they were liable to attachment by a creditor, and he could thus obtain a preference. *Van Alstyne v. Cook*, 25 N. Y. 489; *Innes v. Lansing*, 7 Paige, 583.

*Bosard & Corlis and Cy. Wellington*, for respondents.

If the transaction constituted an assignment it would not avail appellant for it would pass the title, and the property would not be liable to attachment. *Fuller v. Hasbrouck*, 8 N. W. Rep. 697.

In all the cases in which the courts have held the instrument to be an assignment, the statutes rendered an assignment with preferences absolutely void without declaring that the property became a trust fund, as in *Bonns v. Carter*, 31 N. W. Rep. 381; *Winner v. Hoyt*, 28 id. 387; *Wilkes v. Walker*, 53 Am. Rep. 706; *Page v. Smith*, 24 Wis. 368. And in those cases in which the preference was declared invalid by the statute, the creditors did not attempt to raise the question by seizing the property and claiming the preference the statute condemned, but by proceeding in equity to have the property declared a trust fund for the benefit of all the creditors. *Martin v. Hausman*, 14 Fed. Rep. 160; *Clapp v. Dittman*, 21 id. 15; *Dahlman v. Jacobs*, 15 id. 868; *Clapp v. Nordmeyer*, 25 id. 71; *Woonsocket Co. v. Falley*, 30 id. 808; *Freund v. Yægerman*, 26 id. 812; *Holt v. Bancroft*, 30 Ala. 193; *Preston v. Spaulding*, 120 Ill. 208, 10 N. E. Rep. 903; *Hide & L. Nat'l Bank v. Rehm*, 18 N. E. Rep. 788; *White v. Cotzhausen*, 9 Sup. Ct. Rep. 309.

An attaching creditor cannot raise the question. *Waterman*

v. Silberberg, 2 S. W. Rep. 5; Berry v. O'Connor, 21 N. W. Rep. 840; Campbell v. Colorado C. & I. Co., 10 Pac. Rep. 248; Atherton & Co. v. Ives, 20 Fed. Rep. 894; Burrill, Assignments; § 165.

The mortgage, neither alone, nor in connection with the other mortgages, was an assignment for the benefit of creditors; and it is in such assignments only that a preference is prohibited. With this exception the policy of this territory is in the line of the common law which permits preferences, there being no fraud in the transaction. § 2021. The assignment in which a preference is void is an assignment executed in conformity with that title, and is an assignment under which the assignee is vested with the legal title to the property, and is required to file an inventory, give a bond, and ultimately account for the discharge of his trust. The cases referred to by appellant, when examined in connection with the statutes under which they arose, present nothing counter to this position. The doctrine deduced from the authorities and which accords with the statutes granting the right to prefer generally, but withholding it in the case of a general assignment, is this: When the debtor recognizes hopeless insolvency, and determines to yield to his creditors control of his entire property, he must allow them all to participate equally; the law declares invalid every device by which he would prevent this. But where he hopes to retrieve his position and expects to continue to exercise control over his property, he may, save as against proceedings *in invitum*, exclude all, or as many as he sees fit. The parties did not contemplate the abandonment of the business and property, at least, such was not the intention of the mortgagors. That the chattel mortgages did not constitute an assignment within the meaning of the statute prohibiting preferences, see Aulman v. Aulman, 32 N. W. Rep. 240; Field v. Fisher, id. 838; Gage v. Parry, 29 id. 822; In re Guyer, id. 826; Ingram v. Osborne, 35 id. 304; Noyes v. Schner, id. 310; Davis v. Scott, 34 id. 353; Southern W. L. Co. v. Haas, 33 id. 657; Van Patten v. Thompson, 34 id. 763; Talbott v. Ewlatt, 7 S. W. Rep. 630; Tootle v. Coldwell, 1 Pac. Rep. 329; Waterman v. Silberberg, 2 S. W. Rep. 578; Gilbert v. McCorkle, 11 N. E. Rep. 296; Lamar v. Poole, 2 S. E. Rep. 322; Stix v. Saddler, 9

N. E. Rep. 905 ; *Magovern v. Richard*, 3 S. E. Rep. 340 ; *Caldwell v. Crittenden*, 23 N. W. Rep. 646 ; *Campbell v. Colorado C. & I. Co.*, 10 Pac. Rep. 248 ; *Doremus v. O'Hara*, 1 Ohio St. 45 ; *Atkinson v. Tomlinson*, id. 237 ; *Bates v. Coe*, 10 Conn. 280 ; *Henshaw v. Sumner*, 23 Pick. 442 ; *Elgin N. W. Co. v. Meyer*, 30 Fed. Rep. 659.

The measure of damages is the full amount due on the mortgage, although in excess of the value of the property after deducting the amount due on the first mortgage. The case of *Keith v. Haggart*, 33 N. W. Rep. 465, decided by this court, is distinguishable for two reasons: 1. Only a portion of the mortgaged property was seized. 2. The balance that was not seized was more than sufficient to pay the mortgage debt.

SPENCER, J. (*After stating the facts as above.*) This action was brought to recover from the defendant the value of a stock of merchandise alleged to have been by him converted to his own use. The plaintiffs were mortgagees of said property, and in possession thereof at the time of the alleged conversion. The defendant was sheriff, and levied upon such property by virtue of certain writs of attachment to him duly issued against the property of J. K. Johnson & Co., at the suit of certain of their creditors. The mortgage under which plaintiffs claim was executed by said firm of J. K. Johnson & Co. The sufficiency of the attachment proceedings upon their face to justify the sheriff in making levy upon the property of the defendants therein (J. K. Johnson & Co.) is conceded.

In April, 1883, J. K. Johnson and one M. J. Mendelson formed a special partnership for the purpose of conducting a general mercantile business, of which said Johnson was the general, and said Mendelson the special partner. This partnership continued until the following September, when it was dissolved, Mendelson withdrawing from the firm. Thereupon said Johnson and one Harvey Boaz formed a partnership, either general or special, and of which it is claimed that Boaz was special partner, under the firm name of Johnson & Co., and consisting of Johnson and Boaz, and taking the stock of merchandise owned by the former firm of Johnson & Co. at an agreed price of \$15,000 ; Boaz paying Men-

delson \$10,000 of this sum, and contributing that amount in the goods thus obtained from Mendelson's interest in the original firm, as his part of the capital in the new firm, as the agreement was, and the new firm of J. K. Johnson & Co. giving Mendelson their notes for the residue of his interest in the old firm. The new firm (Johnson and Boaz), under the same name as the old firm, continued the same business, at the same place, with practically the same stock of merchandise, until November 12, 1883. On that day the firm of J. K. Johnson & Co. executed several chattel mortgages, each on all the goods and merchandise of said firm, including the fixtures and furniture in their store, in the aggregate for the sum of \$37,678.70, to several of the creditors of said firm; the first of which was for \$10,373.46, to the Citizens' National Bank of Grand Forks; the next for \$16,718.19, to the plaintiffs herein; and the third, to certain other creditors, for \$10,587.05. These mortgages were executed in the order named, a few moments' time only intervening between the execution of each, at a very late hour of the night of November 12, 1883. All of the mortgaged property was taken possession of by an agent of the several mortgagees, without objection on the part of the mortgagors, and on the same day they commenced the sale of such property with the consent of the mortgagors, and continued selling such goods at private sale under said mortgages for several days, when the remaining portion of such property was levied upon and taken possession of under an attachment issued against the property of the mortgagors in favor of certain of their creditors not secured by said mortgages. Such levy by the defendant upon said property under said attachments constituted the alleged conversion in this action. On the trial the plaintiffs recovered judgment for the amount of their mortgage debt and interest.

It is claimed by the appellant that the several mortgages executed by the firm of J. K. Johnson & Co. constituted an assignment for the benefit of creditors, under section 4660 of the Compiled Laws of this territory, and that such assignment is void because of preferences, and hence that said mortgaged property was subject to attachment at the suit of other creditors of said firm.

What interest or title to the property in question did the plaintiffs acquire under the chattel mortgage executed to them?



In considering this question we shall assume, for the purposes of this case, that the mortgages were properly executed and filed after having been witnessed in proper form. Concededly, the mortgages were executed to secure the payment of actual *bona fide* indebtedness in favor of the plaintiffs, and to each of the parties to whom they were given. The plaintiffs were actually in possession of the property at the time the defendant levied the attachments complained of, and this by the consent and with the knowledge of the mortgagors. The mortgagors had the right legally to execute the mortgage for the purpose of securing the payment of the debt thereby intended to be secured. These propositions are evident, and not disputed. But at this point other considerations enter into the case. By section 4660 of the Compiled Laws of Dakota it is provided: "An insolvent debtor may, in good faith, execute an assignment of property to one or more assignees in trust, toward the satisfaction of his creditors, in conformity to the provisions of this title; subject, however, to the provisions of this Code relative to trusts, and fraudulent transfers, and to the restrictions imposed by law upon assignments by special partnerships, by corporations, or by other specified classes of persons; provided, moreover, that such assignment shall not be valid if it be upon or contain any trust or condition by which any creditor is to receive a preference or priority over any other creditor, but in such case the property of the insolvent shall become a trust fund, to be administered in equity in the district court, and shall inure to the benefit of all the creditors in proportion to their respective claims and demands."

We think the evidence shows conclusively that the mortgagors were, at the time of the execution of these several mortgages, insolvent, and unable to pay their obligations as they matured, and that by means of these mortgages they transferred, when they also surrendered possession of the property therein mentioned, as they did immediately upon the execution of the mortgages, substantially all of their property and effects. The aggregate of the amount of the mortgages executed by them was greatly in excess of the value of all their property.

Johnson, the general partner of the firm, testifies that the property mortgaged was not worth to exceed \$30,000, and that it was

all the property owned by the firm. The mortgages are shown to have exceeded \$37,000, and there' was other indebtedness, amounting, in the aggregate, to a large sum.

It is evident that, at the time of the execution of these mortgages, the members of the firm which executed them — the general partner, at all events — knew that the firm was hopelessly insolvent, and that there was no prospect or intention of resuming the business; that it was impractical and impossible to do so. So slight was the hope that the business could be continued by the firm that immediately the very next act that was done after the execution of the mortgages was to permit, if not to deliver, possession of the entire property to pass to the mortgagees, who began selling the goods, with the consent of the mortgagors, at the opening of the store in the morning following the night of the execution of these transfers. It is equally apparent that it was the intention of these mortgagors to give to these plaintiffs and others to whom these mortgages were given a preference over all other creditors. It cannot be successfully disputed that the execution of these mortgages was in pursuance of a scheme to appropriate the entire assets of this firm to the persons and firms obtaining the mortgages, to the exclusion of the other creditors of the firm, and that this method was adopted so as to escape the effect of a formal assignment containing such preferences. This was doubtless the design of all parties to these instruments.

The purpose of the section of the Compiled Laws before quoted is manifest. It is to make equal distribution of the assets of an insolvent debtor, who shall voluntarily assign all his property among his creditors according to their several debts. It renders an assignment containing preferences invalid, and, notwithstanding such preferences, gives to every creditor the absolute right to share ratably in the distribution of the assets of the insolvent. Its design is to prevent preferences among creditors at the mere caprice of the insolvent. It is remedial in its nature, and must be construed liberally, and so as to accomplish the purposes for which it was enacted. Insolvent debtors must not be permitted to evade its provisions merely by adopting the forms of other legal instruments, whether judgment by confession or mortgages, or by calling the instrument by which the transfer of all his prop-

erty is effected to creditors of his choice, to the exclusion of others of them, something — any thing — less or different than an assignment. Under this statute, whenever an insolvent debtor makes a general disposition of all his property and effects, whether to all or only a part of his creditors, thereby abandoning his business, or putting himself in such situation that it is impossible for him to continue in it, he has made a voluntary assignment; and this, whether the instrument by which the operation is effected be by means of an instrument usually denominated an “assignment,” or by mortgage or confession of judgment, or by several of either or both. So long as the instrument employed by the debtor, whatever it be called, works an absolute transfer of substantially all the property and effects of the insolvent from him to another or others with a design on his part that it shall do so, and that his connection with the business shall cease, it is a voluntary assignment on his part under the statute in question. *Harkrader v. Leiby*, 4 Ohio St. 602. In that case the defendant, Leiby, was insolvent, and executed a mortgage upon the greater portion of his property — substantially all of it — with the intent to prefer certain of his creditors. The statute of Ohio provides that “an assignment of property in trust, which shall be made by debtors to trustees in contemplation of insolvency, with a design to prefer one or more creditors to the exclusion of others, shall be held to inure to the benefit of all the creditors in proportion to their respective demands.” It was contended that under this statute the mortgage could not be held to be an assignment; that it merely created a lien upon the property mortgaged, and was not a conveyance of it; and that the mortgagee was not a trustee for creditors. The court, in its opinion in the case, said: “To bring a case within the operation of the law there must be a transfer or conveyance of property, or some valuable interest belonging to the insolvent debtor, in view of his insolvency, to be held by the person taking it, for the benefit of some one or more of the creditors of the debtor other than himself. But we are clearly of opinion that an assignment, by way of mortgage, may affect such transfer; and in such case the mortgagee becomes a trustee for such creditor or creditors.” And again they say: “We are not construing a penal statute. This statute is of the most

beneficial character, and the uniform language of the court has been that it ought to receive a most liberal construction. It promotes justice and equity, by compelling an equal distribution of the effects of an insolvent debtor among those equally entitled; \* \* \* that it allows the debtor to use his property for the payment or security of any of his debts. But as soon as he attempts to create a trust with a preference for any of his creditors, by surrendering any of his property, the statute steps in and declares it a trust for all; that when he puts his property beyond his power for such purpose the law deprives him of all ability to direct or control its distribution. The statute was passed to furnish the remedy, and should be so construed as to make it effectual. This can only be done by looking at its spirit and purpose, and holding cases falling within the mischief intended to be remedied to be within the act." The decision was approved in *Dickson v. Rawson*, 5 Ohio St. 224.

Decisions to the same effect have been made by the courts of many of the states. Thus, in *Burrows v. Lehndorff*, 8 Ia. 96, the court construed a section of the Iowa Code which provides that no general assignment of an insolvent, or in contemplation of insolvency for the benefit of creditors of the assignor, shall be valid, unless it be made for the benefit of all his creditors in proportion to their respective claims. The defendant in that case, being insolvent, executed in the course of two days five chattel mortgages and a deed of trust for the purpose of securing some of his creditors, but not all of them. The court held that these instruments, though executed upon different days and to different parties, constituted an assignment by which some creditors were preferred to the exclusion of others; that it was invalid. See, also, *Lampson v. Arnold*, 19 Ia. 479.

In *Winner v. Hoyt*, 66 Wis. 227, 28 N. W. Rep. 380, several chattel mortgages were made and assignments of accounts by the various debtors. There was, however, no formal assignment. The court held that these instruments, construed together, constituted one paper, using this language: "The mere fact that the transfer was effected by eleven different instruments, instead of one, did not prevent the transaction from being in substance and effect an assignment. It is not so much the form as the effect

which is to be considered. \* \* \* If we look to the substance and purpose of the whole transaction, instead of mere forms, there seems to be no escape from the conclusion that it was in legal effect a voluntary assignment or transfer of all the property of the debtors for the benefit of the particular creditors named; hence was a preference. Such being the substance of the transaction, it was in direct violation of the statute."

The statute of Kentucky, upon this subject of insolvents making assignments, is somewhat different from that of this territory, but it is intended for the same purpose. And it was held in *Thompson v. Heffner*, 11 Bush, 359, that "if the facts are such as to show that, at the time of making a mortgage preferring one creditor over another, the debtor must have known he was insolvent, it will be within the statute."

In Illinois it is provided, by section 13 of the voluntary assignment act of that state, that "every provision in any assignment hereafter made in this state providing for the payment of one debt or liability in preference to another, shall be void, and all debts and liabilities within the provisions of the assignment shall be paid *pro rata* from the assets thereof." The supreme court of that state, in *Preston v. Spaulding*, 120 Ill. 208, 10 N. E. Rep. 903, had occasion to construe this statute with reference to the effect of certain transfers of property made by an insolvent debtor, but not by formal assignment, by which certain of his creditors were preferred, and in doing so employed the following language: "When he [the debtor] reaches the point where he is ready and determines to yield the dominion of his property, and makes an assignment for the benefit of his creditors, under the statute, this act declares that the effect of such assignment shall be the surrender and conveyance of all his estate, not exempt by law, to his assignee, rendering void all preferences, and bringing about the distribution of his estate equally among his *bona fide* creditors. And we hold that it is within the spirit and intent of the statute that when the debtor has formed a determination to voluntarily dispose of his whole estate, and has entered upon that determination, it is immaterial into how many parts the performance or execution of his determination may be broken. The law will regard all his acts having for their object and effect the disposition

of his estate as parts of a single transaction, and on the execution of the formal assignment it will, under the statute, draw to it, and the law will regard as embraced within its provisions, all prior acts of the debtor having for their object and purpose the voluntary transfer or disposition of his estate to or for creditors; and if any preferences are shown to have been made or given by the debtor, or to one creditor over another, in such disposition of his estate, full effect will be given the assignment, and such preferences will, in a court of equity, be declared void, and set aside as in fraud of the statute."

By a statute of the state of Missouri, it is provided that "every voluntary assignment of lands, tenements, goods, chattels, effects, and credits, made by a debtor to any person in trust for his creditors, shall be for the benefit of all the creditors of the assignor, in proportion to their respective claims; and every such assignment shall be proved or acknowledged and certified and recorded in the same manner as is prescribed by law in cases wherein real estate is conveyed." Rev. St. Mo., § 354. The court, in considering the effect of this statute in a case where the insolvent debtor had mortgaged all of his property to secure a part of his creditors, and surrendered the property so mortgaged to them, said: "Under this provision of law, a merchant may give a mortgage or a deed of trust in part or all of his property to secure one or more of his creditors, thus preferring them; but he cannot convey the whole of his property to one or more creditors, and stop doing business. Such turning over and virtually declaring insolvency brings the instrument or act by which it is done within the assignment law of Missouri, which requires a distribution of the property of the failing debtor for the benefit of all the creditors in proportion to their respective claims." Kellog v. Richardson, 19 Fed. Rep. 70. This construction was approved by Mr. Justice MILLER in Perry v. Corby, 21 Fed. Rep. 737; and in Kerbs v. Ewing, 22 Fed. Rep. 693, Judge McCrary, speaking in reference to the same statute, says: "No matter what the form of the instrument, where a debtor, being insolvent, conveys all his property to a third party to pay one or more creditors, to the exclusion of others, such a conveyance would be construed to be an assignment for the benefit of all the creditors."



The supreme court of the United States has recently had occasion to consider the effect of the execution by an insolvent debtor of various instruments upon different days and to different persons, and by which they were preferred to other creditors, with reference to the Illinois statute before cited. In that case (*White v. Cotzhausen*, 129 U. S. 329, 9 Sup. Ct. Rep. 309) Judge HARLAN, delivering the opinion of the court, says: "We agree with the supreme court of Illinois that this statute, being remedial in its character, must be liberally construed; that is, construed 'largely and beneficially, so as to suppress the mischief and advance the remedy.' \* \* \* If, then, we avoid overstrict construction, and regard substance rather than form, if effect be given to this legislation, as against mere devices that will defeat the object of its enactment, the several writings executed by Alexander White, Jr., all about the same time, to his mother, sisters and brother, whereby, in contemplation of his bankruptcy, and according to a plan previously formed, he surrendered his entire estate for their benefit, to the exclusion of all other creditors, must be deemed a single instrument, expressing the purposes of the parties in consummating one transaction, and operating as an assignment or transfer under which the appellee Cotzhausen, may claim equality of right with the creditors so preferred. It is true there was not here, as in *Preston v. Spaulding*, a formal deed of assignment by the debtor under the statute; but of what avail will the statute be in securing equality among the creditors of a debtor who, being insolvent, has determined to yield the dominion of his entire estate, and surrender it for the benefit of creditors, if some of them can be preferred by the simple device of not making a formal assignment, and permitting them under the cover or by means of conveyances, bills of sale, or written transfers, to take his whole estate on account of their respective debts, to the exclusion of other creditors? If Alexander White, Jr., intending to surrender all his property for the benefit of his creditors and to stop business, had excepted from the conveyances, bill of sale, and transfers executed to his mother, sisters and brother a relatively small amount of property, and had shortly thereafter made a general assignment under the statute, it could not be doubted, under the decision in *Preston v. Spaulding*, and in view of the facts here disclosed, that



such conveyances, bill of sale, and transfers would have been held void as giving forbidden preferences to particular creditors, and his assignment would have been held, at the suit of other creditors, to embrace, not simply the property owned by him when it was made, but all that he previously conveyed, sold, and transferred to his mother, sisters and brother. But can he, having the intention to quit business and surrender his entire estate to creditors, be permitted to defeat any such result by simply omitting to make a formal assignment, and by including the whole of his property in conveyances, bills of sale, and transfers to the particular creditors whom he desires to prefer? Shall a failing debtor be allowed to employ indirect means to accomplish that which the law prohibits to be done directly? These questions must be answered in the negative. They could not be answered otherwise without suggesting an easy mode by which the entire object of this legislation may be defeated."

It is true that none of the statutes referred to are precisely like the one we are called upon to construe in this case. But their spirit and purpose are similar. It is evident that the object of this act is to prevent an insolvent debtor, by any form of instrument, from conveying or transferring all, or practically all, of his property to one or more of his creditors to the exclusion of all others. Any other construction would render the statute futile, and enable such a debtor, by the merest evasion, to accomplish an object forbidden by law.

What possible difference can it make what the form of the instrument is, if it be effectual to transfer the property and create the fund? Of what avail is the statute if an insolvent debtor, notwithstanding its provisions against preferences in assignments, may, by means of a mortgage or a confessed judgment, secure to one or more of his creditors all of their indebtedness against him, and leave the others entirely unprovided for? The object of the statute was to prevent and defeat preferences, and it must be so construed as to accomplish its purpose. It is unreasonable and absurd to suppose that the legislature, when it enacted that there should be no preferences in assignments of insolvent debtors, yet left it easy and convenient for such persons to accomplish the same object by designating the instrument by which it was accomplished

by another name. Such a construction would, in effect, nullify the statute, and render it nugatory and meaningless. This construction of the statute works no hardship upon any class of creditors or the debtor himself. The latter may still, under section 4654 of the Compiled Laws, pay or secure the claim of one creditor in preference to another, and, though financially embarrassed, may sell and transfer property for the payment in good faith of his obligations. *Field v. Geohegan*, 125 Ill. 70, 16 N. E. Rep. 912; *White v. Cotzhausen*, *supra*. But he cannot, when insolvent and on the brink of bankruptcy, knowing that he must abandon his business and surrender his property to his creditors for their benefit, by any device or make-shift, transfer all his effects to one or several of them, to the exclusion of all others. Under such circumstances his assignment, if he make one, by whatever form of instrument, is for the benefit of all his creditors equally, in proportion to their demands against him.

This view of the effect of this statute upon the several mortgages in question under which the plaintiffs claim does not, however, necessitate a reversal of the judgment appealed from. It will be observed that, while the statute of this territory before referred to, provides that assignments containing preferences shall not be valid, it does not make them absolutely invalid for every purpose. The mortgages themselves do not indicate that there are any other creditors, and it has only been demonstrated that there are others by proof independent of them. It will be further observed that by this statute it is also provided that, if such assignment be upon or contain any contract or condition by which any creditor is to receive a preference or priority over any other creditor, the property of the insolvent shall become a trust fund, to be administered in equity in the district court, and shall inure to all of the creditors in proportion to their respective claims or demands. Under this provision of the statute, while the mortgages under which the plaintiffs claim must be considered as an assignment by the mortgagors, in view of all the facts in this case, and invalid as an assignment because of the preference secured by it, yet it was sufficient, when accompanied by the delivery of possession of the property, to pass the title from the mortgagors, and vest it in the plaintiffs and their co-mortgagees as a trust fund, of

which they became trustees for the benefit of all the creditors of the assignors. As such trustees they have the right to maintain this action against the defendant, and to hold the property until an assignee or receiver shall be appointed by the district court to take charge and administer the fund under its direction.

The mortgages are valid instruments as such, as between the parties, and were based upon adequate consideration. For the reasons that the mortgagors were insolvent at the time of the execution of the mortgages, and by that means conveyed and transferred substantially all their property, they were held under the assignment law of this territory to constitute an assignment. The law does not tolerate preferences in such instruments, and declares them invalid. But it does not effect a reconveyance of the property to the assignor. On the contrary, the assignor, by the execution of the instruments of assignment, has divested himself of his property, and has placed it beyond his ability to direct or control it in any way. If it contain or provide for preferences, to that extent it is invalid; but it is still valid as an assignment of his property, and by operation of law the property so assigned becomes a fund in equity, discharged from the preferences created by the assignment, which is to be distributed ratably among the creditors of the insolvent. In other words, under section 4660 of the Compiled Laws of Dakota, an assignment by an insolvent debtor containing preferences is valid as an assignment of his property, though invalid as to the preferences contained in or secured by it, and operates to divest the assignor of the title to his property, and creates a fund in equity in which all his creditors are entitled to share equally in proportion to their respective claims. And the person or persons to whom such assignment is made, whatever its form, became trustees of the fund for the benefit of all the creditors; and the fund is to be administered under the direction of the court, and is to all intents and purposes in the custody of the law. The statute declaring such preferences void was not enacted for the purpose of enabling other creditors to gain a preference by attachment proceedings or otherwise against the assignor. On the contrary, its purpose was to prevent preferences, and compel an equal distribution of the assets of the debtor. The attaching creditors are in no better situation than the mortgagees. The

mortgages were given to secure debts honestly owing by the insolvents and without fraud. They are not void as mortgages, but as constituting, when considered together, in view of the facts surrounding their execution, an assignment containing preferences, by an insolvent debtor, of all his property. The very instant such an assignment was executed, the property of the debtor became a fund in equity for payment ratably of the claims of all the creditors, and the fund now so remains in the hands of the mortgagees as trustees for such purpose.

The facts of the case do not bring it within any of the provisions of the Code of Civil Procedure allowing attachments against debtor's property, when considered with reference to those statutes. The property attached was no longer the property of the debtor; it had not been disposed of to hinder, delay or defraud his creditors, within the purview of the law in regard to attachments, and when they may issue, but, on the contrary, in payment of liabilities honestly owing by him. The acts of the insolvent in making the mortgages only became illegal when it was established that, being insolvent, they had conveyed all their property to some of their creditors to the exclusion of others, and then only when considered in the light of the statute in regard to preferences in assignments made by insolvent debtors. As mortgages, they were valid as between the parties. As an assignment, they were invalid as to the preferences secured, but valid to divest the title of the assignors in the property, and vest it in the assignees for the benefit of all the creditors, relieved from the preferences. The provisions of the statute became an element of the contract, which is to be considered and given effect.

To permit the defendant to gain a preference by his attachment in this case would be to pervert both the statute in regard to when attachments may issue in this territory, and that forbidding preferences by insolvent debtors, to purposes for which neither of them were intended or designed. Such a construction would absolutely defeat the intention of the legislature in enacting the proviso contained in section 4660 of the Compiled Laws, and, instead of creating from the property of the insolvent a fund to be administered in equity for the benefit of all the creditors of any insolvent, enable some who might be more conveniently located

for the purpose than others, or by the consent of the insolvent, to obtain preferences by attachment proceedings, and thus accomplish the very mischief this statute was intended to prevent.

The property became a trust fund in equity the moment the assignment was executed and delivered, and the defendant obtained no lien by levying his attachment. The property was at that time *in custodia legis*, and not the subject of attachment by creditors of the insolvent. The title had passed as absolutely from the assignor as though he had made a formal assignment without preferences. Under the statute they had in effect made an assignment of all their property for the benefit of their creditors without preferences. Such an assignment is not ground for attachment. *Place v. Miller*, 6 Abb. Pr. (N. S.) 178; *Ebner v. Bradford*, 3 id. 248. And as the same reasons apply whether the partnership be considered general or special, and an attachment under the facts and circumstances of this case will not lie under either conclusion, we express no opinion on that question.

Damages. Upon the question of damages, we think the trial court adopted an erroneous measure. By section 4603, Comp. Laws, it is provided that the detriment caused by wrongful conversion of personal property is presumed to be (1) the value of the property at the time of the conversion, with interest from that time; (2) where the action has been prosecuted with diligence, the highest market value of the property at any time between the conversion and the verdict, without interest. They could have adopted either of these rules. They did adopt the former, and the court has found, as a fact, what the value of the property was at the time of the conversion; that it was \$22,260.33, subject, however, to a mortgage in favor of the Citizens' National Bank of Grand Forks of \$10,567.58, upon which they have realized, leaving, as the sum to which the plaintiffs would be entitled, \$11,692.75. We are of opinion that this is the proper measure of damages to be applied in this case. It was so decided in *Keith v. Haggart*, 33 N. W. Rep. 465.

From these considerations it follows that the judgment in this action must be modified so as to limit the amount of the recovery to the sum of \$11,692.75, that being the value of the mortgaged goods converted, as found by the trial court, after deducting the

amount due upon a prior mortgage, upon which, as appears by the record herein, an action has been brought and recovery had; and as thus modified said judgment must be affirmed, without prejudice, however, to any of the creditors of the firm of J. K. Johnson & Co. to take such proceeding in the district court as they may be advised to have the property in the hands of the plaintiffs declared a trust fund, in which all of such creditors may share ratably, in accordance with the views heretofore expressed. All of the justices concurring, excepting McCONNELL, J., not sitting.

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CITIZENS' NATIONAL BANK, Respondent, *v.* JENKS, Appellant.

FIELD ET AL., Appellants, *v.* SAME, Respondent.

CUMMINGS, Appellant, *v.* SAME, Respondent.

HORNTHAL ET AL., Appellants, *v.* SAME, Respondent.

ALLER ET AL., Appellants, *v.* SAME, Respondent.

*Stone & Newman*, for appellant in the first of the above causes and for the respondent in the others.

*Bosard & Corliss*, for respondent in the first and for appellants in the others.

SPENCER, J. The judgments appealed from in the foregoing entitled actions are affirmed on the opinion in *Straw et al. v. Jenks* (decided at this term). In the five actions lastly above entitled it would probably have not been erroneous to have submitted the cases to the jury, with instructions that they would be warranted in finding for the plaintiffs, respectively, nominal damages, and nothing more; but we do not think the omission to do this, under the circumstances, sufficient to justify us in reversing the judgment. Judgments affirmed. All concurring except McCONNELL, J., not sitting.

SMITH ET AL., Respondents, v. CONTINENTAL INS. CO., Appellant.

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**1. Insurance — Policy — Forfeiture — Breach of Condition.**

Where a policy of insurance provided that it should become void on assured's mortgaging the property without the consent of the company indorsed on the policy by the superintendent, the company is not estopped from insisting on a breach of this condition from the fact of its mere soliciting agent giving the assured to understand at the time he took the application that the giving of mortgages would not affect the policy when the company by its general officers had no knowledge of the understanding until after suit had been commenced.

**2. Same.**

A condition in a policy rendering it void on procuring additional insurance without the consent of the company indorsed on the policy by the superintendent, is not waived by an agent of the company, whose business was to select soliciting agents, receiving notice thereof from the assured, where such agent had never given permission for procuring the insurance and his agency had terminated a few days before the mailing of the notice.

**3. Same — Waiver — Evidence.**

Where the premium has been earned prior to a forfeiture, its subsequent receipt is not inconsistent with a defense based on the forfeiture, nor is it evidence of a waiver thereof although the period for which the policy was given had not expired.

(Argued May 20, 1889; opinion filed October 10, 1889.)

**A** PPEAL from district court, Cass county; Hon. W. B. McConnell, Judge.

*Ball, Wallin & Smith*, for appellant.

The plaintiff had violated two provisions in his policy, that prohibiting additional insurance without the written consent of the defendant indorsed on the policy; and the other with reference to incumbering the property. Either of these conditions, when broken, operated to render the policy void. These stipulations are always regarded as material and with favor. May, Ins., § 364. See, also, C. C., § 1539.

There was nothing in the talk between the respondent Smith and the agent that would relieve him from the obligations of his policy. There was no evidence of any waiver as to the chattel mortgage whatever. The court also erred in submitting that question to the jury.

There was none of the elements of an equitable estoppel in the



case. *May, Ins.*, § 507; *Shimp v. Cedar Rapids Ins. Co.*, 16 N. E. Rep. 229; *North-Western M. L. Ins. Co. v. Anerman*, 10 id. 225. The case of *Smith v. St. Paul F. & M. Co.*, 3 Dak. 80, is not in point. But underlying this question of a pretended waiver, there is the fact that the testimony fails to bring home to the company notice of the breaches at any time. Therefore, the opportunity to waive the breaches of the policy was never presented to the company. The motion to direct a verdict should have been granted. On the subject of waiver, see 2 Dak. 114; *Cleaver v. Traders' Insurance Co.*, 32 N. W. Rep. 660; *Kite v. Commercial Union*, 10 N. E. Rep. 518; *Globe Mutual Ins. Co. v. Wolff*, 95 U. S. 326, Book 24 L. C. P. Co. 387; *Moore v. State Ins. Co.*, 34 N. W. Rep. 183; *Carpenter v. Providence W. I. Co.*, 16 Pet. 494; 4 How. 184.

*Greene & Hildreth*, for respondents.

The defendant is estopped, under the undisputed facts, from claiming a forfeiture on account of the execution of any chattel mortgages on the property covered by this insurance. *Ins. Co. v. Young*, 58 Ala. 476; *Siltz v. Hawkeye Ins. Co.*, 29 N. W. Rep. 605; *Jordan v. States Ins. Co.*, 64 Ia. 216, 19 N. W. Rep. 917; *Boetcher v. Hawkeye Ins. Co.*, 47 Ia. 253; *Miller v. Mutual Benefit Life Ins. Co.*, 31 id. 216; *Stone v. Hawkeye Ins. Co.*, 28 N. W. Rep. 47; *Kruger v. Western F. & M. Ins. Co.*, 13 Pac. Rep. 156; *Woodruff v. Imperial Ins. Co.*, 83 N. Y. 140; *N. Y. Central Ins. Co. v. Nat. Pro. Ins. Co.*, 20 Barb. 476; *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 241; *Winchester Ins. Co. v. Earle*, 33 id. 151; *Ins. Co. v. Mahone*, 21 Wall. 152; *Mitler v. Ins. Co.*, 12 id. 285; *Ins. Co. v. Slaughter*, id. 404; *Ins. Co. v. Wilkinson*, 13 id. 222; *Peoria Ins. Co. v. Perkins*, 16 Mich. 173; *Continental Ins. Co. v. Horton*, 28 id. 173; *Mich. St. Ins. Co. v. Lewis*, 30 id. 45; *Peoria Ins. Co. v. Hall*, 12 id. 202; *Aurora F. & M. Ins. Co. v. Kranich*, 36 id. 288; *Niagara F. Ins. Co. v. Brown*, 12 West. Rep. 817; *Ætna Ins. Co. v. Olmstead*, 21 Mich. 252; *North B. & M. Ins. Co. v. Steiger*, 16 N. W. Rep. 96; *Mullin v. Vermont Mutual F. Ins. Co.*, 2 New Eng. Rep. 483; *Thomas v. Hartford Ins. Co.*, 2 West. Rep. 527; *Ransel v. Ins. Asso. (Minn.)*, 16 N. W. Rep. 430; *Liverpool & L. & G. Ins. Co. v.*

Ende, 65 Tex. 118; Wheeler v. Traders' Ins. Co. (N. H.), 1 New Eng. Rep. 322; Yates v. Penn. F. Ins. Co., 10 Hun, 489; Breckinridge v. Am. Ins. Co., 4 West. Rep. 569; Phoenix Ins. Co. v. LaPoint, 5 id. 512; Ind. Ins. Co. v. Hartwell, 100 Ind. 566; Wood, Ins., §§ 400, 402, 403.

The defendant waived its right to claim a forfeiture on account of the additional insurance. Hamilton v. Home Ins. Co., 7 S. W. Rep. 266; May, Ins. 370; Haywood v. Ins. Co., 52 Mo. 181; Pelkington v. Ins. Co., 55 id. 172; Baile v. Ins. Co., 73 id. 371; Breckinridge v. Ins. Co., 87 id. 62; Webster v. Phoenix Ins. Co., 36 Wis. 67; Phoenix Ins. Co. v. Spiers, 8 S. W. Rep. 456; Ins. Co. v. Shea, 6 Bush, 174; Wood, Ins., §§ 358, 364, 371, 400, 401, 402, 403, 407; Ins. Co. v. Lyons, 38 Tex. 253; Pitney v. Glens Falls Ins. Co., 65 N. Y. 1; Ins. Co. v. Wilkinson, 13 Wall. 222; Ins. Co. v. McCain, 96 U. S. 86; Cobb v. Ins. Co., 11 Kan. 93; Potter v. Ontario Ins. Co., 5 Hill, 147; Planter Mutual Ins. Co. v. Lyone, 38 Tex. 253; Winchester Ins. Co. v. Earle, 33 Mich. 147; Cannon v. Home Ins. Co., 11 N. W. Rep. 11; Penn. F. Ins. Co. v. Kittle, 39 Mich. 51; Gans v. St. Paul F. & M. Ins. Co., 43 Wis. 113; Martheson v. N. British Ins. Co. (Mich.), 31 N. W. Rep. 297; Hadley v. N. H. Ins. Co., 55 N. H. 110; Westlake v. Ins. Co., 14 Barb. 406; Farmers' Ins. Co. v. Taylor, 73 Pa. St. 342; Goodall v. N. E. & C. Ins. Co., 25 N. H. 169; Dayton Ins. Co. v. Kelly, 24 Ohio St. 345; Howitz v. Equitable Ins. Co., 40 Me. 557; Ins. Co. v. McDowell, 50 Ill. 120; Geib v. International Ins. Co., 1 Dill. 443.

Forfeitures are so odious that they will be enforced only when there is the clearest evidence that such was the intention of the parties. May, Ins., § 361; Chicago Life Ins. Co. v. Warner, 80 Ill. 415; C. C., § 812.

The facts with reference to receiving the premium bring the case clearly within the rule adhered to by this court in Smith v. St. Paul F. & M. Ins. Co., 13 N. W. Rep. 355. See, also, Tuckerman v. Bigler, 46 Barb. 375; Matthews v. Ins. Co., 40 Ohio St. 135; Am. Ins. Co. v. Henly, 28 Ind. 64; Black v. Ridgway, 131 Mass. 80; Randolph, Com. Paper, § 539; Campbell v. Adams, 38 Barb. 132; Walkenburgh v. Lenox Fire Ins. Co., 5 N. Y. 465; Griffey v. N. Y. C. Ins. Co., 3 East. Rep. 130; American

Ins. Co. v. Stoy, 41 Mich. 385; Jolliffe v. Madison Ins. Co., 39 Wis. 111.

TEMPLETON, J. This action is based upon a fire insurance policy issued by defendant, and bears date July 29, A. D. 1885. The face of the policy was \$3,500, the term five years, and a portion of the property insured consisted of a granary, and a quantity of grain therein. The risk upon the granary was \$500, and the risk upon the grain was \$2,000. On the 29th of October, A. D. 1887, the granary, and four thousand bushels of wheat and two thousand bushels of oats were destroyed by fire. It was conceded that the value of the property destroyed exceeded the amount of insurance thereon.

The policy was issued to Mr. Smith, but subsequently, and before the loss, was assigned to Mr. Hitchcock, and made payable to him, so far as his interest might appear. Hitchcock held a mortgage covering the real estate upon which the granary stood. He had no interest in the crops or grain.

The premium upon said policy was \$58.18, of which \$14.54 was paid in cash when the policy was issued, and the balance was settled by Mr. Smith giving his note for \$43.64, payable on the 1st day of November, A. D. 1886. The policy contained the usual clause suspending its operation during the time any note given for premium should remain past due and unpaid, and also the following provisions: “\* \* \* And it is stipulated and agreed, \* \* \* if the assured, without written permission hereon, shall now have, or hereafter make or procure, any other contract of insurance, whether valid or not, \* \* \* or if the property shall hereafter become mortgaged or incumbered, \* \* \* without consent indorsed hereon, then \* \* \* this policy shall be null and void.”

This policy is issued from the office of the company, at Chicago, Illinois, and it is stipulated that no agent or employee of this company, or any other person or persons than the superintendent of the western department, at Chicago, Illinois, shall have power or authority to waive or alter any of the terms or conditions of this policy, or to make indorsements hereon, and all agreements by the superintendent must be signed by him.

Two defenses were set up in the answer, and relied upon to defeat the action. The first defense alleges a breach of that condition in the policy regarding incumbrances; the second, a breach of that condition regarding additional insurance.

Plaintiffs admit that after the delivery of the policy, and before the loss, the plaintiff Smith gave eight chattel mortgages, each of which became a valid lien upon the grain described in the policy, and that the consent of the company, permitting such incumbrances, was never indorsed upon the policy. It is also admitted that plaintiff Smith, about two months prior to the loss, procured from another insurance company, to-wit, the Western Fire and Marine Insurance Company of Sioux Falls, Dak., a policy of insurance for the sum of \$1,000, upon said grain, and that the defendant's consent to such additional insurance was never indorsed upon the policy in suit.

Plaintiffs claimed at the trial that those forfeitures had been waived by defendant, and introduced testimony which they insisted to show such waiver. The facts which it is claimed constituted a waiver of the forfeiture arising from the giving of the chattel mortgages are, in brief, as follows: One Jed L. Angell was defendant's agent at Fargo, Dak., for the purpose of taking applications, forwarding them, delivering policies, and collecting premiums.

Angell took Smith's application for the risk in question, and at that time told Smith that the company cared nothing for incumbrances upon the chattels, and gave him to understand that mortgages of that character would not invalidate the policy. The policy was sent by defendant's superintendent to Mr. Angell, and by him, pursuant to instructions received from Smith, delivered to one Darling, who was Smith's agent for the purpose of receiving said policy, and caring for it. Smith never saw the policy until after the loss occurred.

Angell had no power to make insurance contracts, nor issue policies, and, so far as the case shows, had never assumed to have such power. This policy, in accordance with the rules and custom of the company, was issued from the office of the western department of the company, at Chicago, and was countersigned by R. J. Taylor the superintendent of said department, and, so far as

appears, is in the form ordinarily issued by said company on this class of risks. None of the officers or general agents of defendant had notice of Angell's statement to Smith concerning the effect of chattel mortgages upon the property insured until after this suit was commenced.

Under these facts, is the defendant estopped from claiming a forfeiture by reason of the execution of the chattel mortgages? We think not.

This is a very different case from that where a soliciting agent purposely or erroneously inserts false answers to questions in an application, the applicant stating the facts truthfully, and being innocent of fraud. In such a case the sub-agent is acting within the scope of his powers and duties — taking applications is his business, — and notice to him is notice to the principal, under well-settled rules of law. If Angell had been a general agent, — that is, if he had been authorized by the company to make contracts of insurance and issue policies, — he doubtless would have had implied authority to waive the effect of conditions in the policy inconsistent with existing facts, and possibly the effect of those inconsistent with facts subsequently arising, notwithstanding the limitations in the policy.

This was not a case of insurance by parol, consummated between Angell and Smith; and it is also to be noted that Smith's written application, accepted by the company, did not alone constitute the contract of insurance between the parties. The proposition just advanced has been clearly stated by a learned judge in the following language: "The position of the learned counsel for the appellants, that Deter's application for insurance, accepted by the respondent, constitutes the binding contract of insurance between the parties to it, exclusive of the policy, appears to us wholly untenable. The application is, in effect, for insurance by policy, and the premium note is in terms in consideration of a policy. If the application were accepted otherwise than by policy, then the application and acceptance constituted an inchoate and executory contract, executed and completed by the policy." *Fuller v. Insurance Co.*, 36 Wis. 603. The policy having been delivered to the person appointed by Smith to receive it, he, under the facts of this case, was conclusively presumed to know its con-

tents; and, having accepted and retained it, he cannot now shield himself from the effects of violating its provisions under the plea that he never read it. *Hankins v. Insurance Co.* (Wis.), 35 N. W. Rep. 34; *Cleaver v. Insurance Co.* (Mich.), 32 id. 660; *Catoir v. Trust Co.*, 33 N. J. Law, 487.

These views are not in conflict with *Insurance Co. v. Wells*, 89 Ill. 82. In that case the insurance company was held bound by the statement of the agent taking the application, which statement was, in substance, that if the building insured should become vacant it would not matter, and no notice thereof need be given the company, notwithstanding a contrary provision in the policy. In that case, however, the policy was not delivered to the insured or his agent, but remained in the hands of the person taking the application until after the fire; and it was upon that express ground that the case was distinguished from *Insurance Co. v. Webster*, 69 Ill. 392. The latter case is directly in point here. The court says: "The evidence shows that the property insured, a dwelling-house, was vacated on the 12th day of January, and thereafter remained unoccupied until it was destroyed by fire on the 13th day of the ensuing February. There is no evidence that notice of this fact was given to the company, or that its consent was indorsed on the policy. The plaintiff, however, testified that the reason he did not notify the company that the premises were vacant and unoccupied was because the agent of the company told him, at the time the insurance was made, that it was not necessary to give notice if the house became vacant. The agent of the company swears that what he told the plaintiff was that if the house was not vacant for more than thirty days it was not necessary to give notice. The court, at the instance of the plaintiff, instructed the jury upon this point that 'the neglect of Webster to give notice of the vacancy of the premises for more than thirty days would not vitiate or avoid the policy, if the jury believe from the evidence that the defendant or its agent waived such notice at the time the policy was issued, or at any other time before the loss.' This instruction is clearly erroneous, and should not have been given. No principle of law is better settled than that the evidence of a contract cannot exist partly in writing and partly in parol. Whatever may have been said in reference to

the contract between the parties at the time of or prior to its execution, after it was reduced to writing parol evidence was inadmissible to enlarge, modify, or contradict its terms, as expressed in the written instrument. The parties might, undoubtedly, by a subsequent agreement, modify or enlarge its terms by parol; but that was not the case here. What was relied on as an excuse for not complying with its terms was said when the contract was being made, and is directly contradictory to it, as evidenced by the policy."

Plaintiff's counsel cite a large number of cases to sustain their proposition upon this branch of the case, but they are all clearly distinguishable from the one under consideration. Upon careful examination, each case cited will be found to come within one of the three following classes: *First*, the person whose words or acts are set up as an estoppel was in fact a general agent; *second*, the insurance company, by its conduct, had led the insured to believe that the agent had general powers; *third*, the agent taking the application at the time had notice of the facts which would constitute a forfeiture of the policy, if issued.

We, therefore, hold that the defendant is not estopped by the statement of Angell, the soliciting agent. Insurance Co. v. Conover, 98 Pa. St. 384, 42 Am. Rep. 618; Cleaver v. Insurance Co. (Mich.), 32 N. W. Rep. 660; Hankins v. Insurance Co. (Wis.), 35 id. 34; Insurance Co. v. Davenport, 37 Mich. 609; Insurance Co. v. Wolff, 95 U. S. 326; Tool Co. v. Insurance Co. (Mass.), 13 N. E. Rep. 902; Carrigan v. Insurance Co., 53 Vt. 418, 38 Am. Rep. 687; Brown v. Insurance Co., 59 N. H. 298, 47 Am. Rep. 205; Walsh v. Insurance Co., 73 N. Y. 5; Havens v. Insurance Co. (Ind.), 12 N. E. Rep. 137. There are many other cases holding the same doctrine.

We now come to the facts which plaintiffs claim constitute a waiver of the forfeiture of the policy arising from a violation of the clause regarding additional insurance.

On the day Smith obtained the additional insurance, the following letter, signed by him, was mailed to one N. S. Head, who had, until two days prior thereto, been in the employ of defendant: "Wheatland, 9-2, '87. N. S. Head, Esq., Gen. Agt. Continental Ins. Co., Fargo, D. T.—Dear Sir: I beg to notify you,



as general agent of the Continental Insurance Company, that I have placed \$1,000 of additional insurance on grain in granary, for three months, in the Western Fire and Marine Insurance Company. This, with the \$2,000 on grain in policy I have in your company, makes \$3,000 total insurance on grain. You will please see that your company has proper notice, and accept notice of additional insurance, and much oblige. Respectfully yours, W. P. Smith."

There is no evidence tending to show that any person connected with the company, besides Head, had any notice of the additional insurance. Head himself testified that he had no recollection of receiving said letter; but whether he ever received it or not is immaterial, in view of the facts proven and undisputed. While Smith addressed Head as general agent, that act does not establish the fact, nor does it, alone, show that he was justified in believing, that Head was defendant's general agent. Head himself, and Mr. Taylor, the superintendent of the company, both testified that Head was a special agent in the farm department; his duties being to nominate and recommend parties for appointment as soliciting agents, and to work with and aid such parties in soliciting farm insurance. This testimony was not contradicted. It is not pretended that Head ever gave Smith even oral permission to obtain other insurance. In fact, it does not appear that Smith ever had any dealings with Head regarding this or any other insurance, except the signing of the letter above quoted, which was written and mailed by the agent of the Western Fire and Marine Insurance Company. True, Hamline, the agent of the last-named company, says it was his custom to notify Head in such cases, and that he had done so several times; but it does not appear that the defendant ever had knowledge of this practice, or in any way sanctioned it. Besides, Head's relations with the defendant ceased two days prior to the mailing of the notice. Under these facts, it cannot be held that the defendant waived that provision in the policy relating to additional insurance. *Insurance Co. v. Wolff*, 95 U. S. 326.

In the latter case, Mr. Justice FIELD, writing the opinion of the court, says: "But, even if the agent knew the fact of residence within the excepted period, he could not waive the forfeiture thus

incurred, without authority from the company. The policy declared that he was not authorized to waive forfeitures; and to the provision effect must be given, except so far as the subsequent acts of the company permitted it to be disregarded. There is no evidence that the company in any way, directly or indirectly, sanctioned a disregard of the provision with reference to any forfeitures, except such as occurred from non-payment of premiums."

It may with propriety be remarked that several able courts have held, under similar provisions in policies, that notice to the insurance company itself, if permission is not indorsed on the policy, and the company remained silent, is not sufficient to relieve the insured from the effects of a forfeiture.

There is another point in the case upon which plaintiffs' counsel rely to defeat the forfeitures. When the loss occurred, Smith, as we have already seen, wrote to the defendant, notifying it of the loss, and also of the additional insurance. To this letter defendant never replied, any further than to acknowledge its receipt. Immediately, Smith prepared and forwarded the proper proofs of loss. Whether the company, by merely remaining silent and not requesting proofs of loss, can be held to have waived in this manner the forfeiture regarding additional insurance, it is not necessary for us to decide; for it does not appear that the defendant, or any of its agents, had notice of the chattel mortgages at the time the proofs were furnished. Hence it did not waive the latter forfeiture.

This brings us to the last proposition in the case. After the action was brought, and with full knowledge of all the facts, the defendant accepted from Smith the sum of four dollars, which was the interest due and unpaid upon the premium note.

The policy would not expire by limitation until July, A. D. 1890. The premium note was delivered with the application, and constituted a part of the contract between the parties. The note became due and payable November 1, A. D. 1886. At maturity Smith paid the principal to Angell, who remitted it to the defendant. The note was immediately forwarded to Angell, with instructions to collect the interest. Two years afterward, and about one month before the trial, Smith paid the four dollars in-

terest, and Angell remitted it to the company. Plaintiffs' position regarding these facts is thus stated in the brief of their attorney: "We did not claim at the trial, nor do we here, that the payment of the note, and acceptance of the amount, after the action was commenced, was of itself a waiver of the claim of forfeiture; but that it was a fact properly receivable in evidence, as bearing upon the conduct of the company relative to this claim after it had notice of the loss."

By this language we understand that counsel contends that these facts tended at least to prove a waiver. It must be borne in mind that the policy had been in force over one year when the chattel mortgages were given, and over two years when the additional insurance was obtained. The risk had attached, the note and interest were past due, and by the provisions in the note itself, as well as under the laws of the territory (§§ 1541, 1544, Civil Code), the whole premium was earned, although the full term fixed for the running of the policy had not elapsed. The risk had terminated through no fault of the insurer, and the defendant was legally entitled to collect and retain the premium. Had the policy in this case been voidable in its inception, and no risk had ever attached, counsel's position would have been tenable. When, however, the premium is earned and forfeitures occur before the loss, the taking and retaining of the premium is not inconsistent with a defense based upon such forfeiture, and is not evidence tending to show a waiver thereof. *Pratt v. Insurance Co.*, 55 N. Y. 511; *Shimp v. Insurance Co. (Ill.)*, 16 N. E. Rep. 229; *Williams v. Insurance Co.*, 19 Mich. 451; *Cohen v. Insurance Co. (Tex.)*, 8 S. W. Rep. 296; *Joliffe v. Insurance Co.*, 39 Wis. 111; *May, Ins.*, § 553.

At the close of the testimony defendant's attorneys moved the court to direct a verdict for the defendant upon the following grounds: *First*, that the plaintiffs had forfeited the policy by mortgaging the property insured without the consent of the defendant; *Second*, that the plaintiffs had forfeited the policy by obtaining additional insurance upon the property without defendant's consent.

This motion the court refused, and submitted the case to the jury, who returned a verdict in favor of the plaintiffs for the sum-

of \$2,664; upon which verdict judgment was subsequently entered.

As the case stood, the court should have directed a verdict for the defendant. The stipulations in the policy are such as the parties had a right to make; and the defendant, by delivering the policy, and the plaintiffs, by accepting it, are bound by them. The judgment of the district court is reversed.

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PIELKE, Respondent, *v.* CHICAGO, M. & ST. P. R. Co., Appellant.

**1. Jury — Verdict — Excessive — Appeal — Review.**

On a claim that a verdict for the value of certain property destroyed by fire was excessive, there was evidence that its value was greater, and again, evidence that it was less than that found by the jury. *Held*, (there being a substantial conflict in the evidence) the verdict could not be disturbed.

**2. Appeal — Review — Damages, Remoteness of.**

Where it was sought to reverse a judgment on the ground that the damages were remote, but the evidence was such that the court would not have been authorized in directing the verdict, and there was no exception to the action of the court in charging the jury on this point, *held*, the matter was not saved so that it could be reviewed by the appellate court.

**3. Trial — Case for Jury.**

*Held*, that the connection between the two fires (the one alleged to have been negligently set out by the defendant and the one that destroyed plaintiff's property) described on the former appeal, 5 Dak. 444, 41 N. W. Rep. 669, was, on the second trial, shown to be such as required the submission of the case to the jury.

(Argued May 21, 1889; determined October 10, 1889.)

**A** PPEAL from the district court, Richland county; Hon. W. B. McCONNELL, Judge.

*Ball, Wallin & Smith*, for appellant.

This record shows no testimony to supply the requirement in the evidence which rendered the new trial necessary at a former term of this court. 5 Dak. 444, 41 N. W. Rep. 671. See, also, *Finney v. N. P. Ry. Co.*, 3 Dak. 270; *Star Wagon Co. v. Mathison*, id. 233; *Whittaker's Smith*, Neg. 490; *Wyoming v. Detroit Lake & N. E. Co.*, 26 N. W. Rep. 514; 2 Rorer, Railroads, 788, 789, 796, 807; *Garrett v. Wells, Fargo & Co.*, 15 Wall. 524;

Pierce, Railroads, 437; Michigan C. R. R. Co. v. Anderson, 20 Mich. 244.

The damages were remote. 2 Rorer, Railroads, 807; Pielke v. Chicago, M. & St. P. R. R. Co., 5 Dak. 444, 41 N. W. Rep. 674; Hannaher v. Railway Co., 5 Dak. 1.

*Lauder & Voorhees, Folsom Dow, McCumber & Bogert*, for respondent.

It appears from the record no exception was taken to the introduction or rejection of evidence, or to any of the instructions of the court. The only question, therefore, is, is the evidence sufficient to sustain the verdict?

It is conceded the burden of proof is upon respondent, but he is not obliged to establish a case to a demonstration. "A case cannot be taken from the jury unless it is plain upon the strongest showing made by any of the witnesses that there is no cause of action." Marcott v. M. H. & O. R. Co., 10 N. W. Rep. 53, 47 Mich. 1; Johnson v. Missouri Pac. R. Co., 26 N. W. Rep. 347. Was there any evidence reasonably tending to prove that defendant set out any fire? This inquiry, from the evidence of Lindgren, must be answered in the affirmative. Wood, Railway Law, 1348; Pierce, 436, 437; Woodson v. Milwaukee & St. P. Ry. Co., 21 Minn. 60; Karsen v. Milwaukee & St. P. Ry. Co., 29 id. 12; Wolff v. Chicago, M. & St. P. Ry. Co., 25 N. W. Rep. 63; Gibbons v. Wisconsin Val. Ry. Co., 28 id. 170; Butcher v. Vaca Valley Ry. Co., 8 Pac. Rep. 174; Christ v. Erie Ry. Co., 58 N. Y. 638; Field v. N. Y. Cen. Ry. Co., 32 id. 339; Hoyt v. Jeffers, 30 Mich. 181; 91 U. S. 454.

Was the evidence sufficient to sustain a finding that defendant was negligent? On this point under the evidence, see Pierce, Railroads, 434; Wood, Railway Law, 1350, 1362; Sebelrud v. St. Louis Ry. Co., 29 Minn. 63; Kellogg v. Chicago & N. W. Ry. Co., 17 N. W. Rep. 132; Wolff v. Chicago, M. & St. P. Ry. Co., *supra*; Jones v. Mich. Cen. Ry. Co., 26 N. W. Rep. 662, 665; Gibbons v. Valca Val. Ry. Co., *supra*; Bowen v. St. Paul, M. & M. Ry. Co., 32 N. W. Rep. 751.

There was legal evidence tending to prove the property was worth the amount fixed. The damages were not excessive. It

is claimed the court erred in its instructions in not explaining the nature of proximate and remote cause. No exception was taken. It is now too late to raise objection for the first time. *Pennock v. Dialogue*, 2 Pet. 1; *Rock v. Indian Orchard Mills*, 8 N. E. Rep. 401; *Van Arnam v. Blustein*, 7 id. 537; *Cole v. Germania Fire Ins. Co.*, 1 id. 38; *Story v. Black*, 1 Pac. Rep. 1; *Heldt v. State*, 30 N. W. Rep. 626; *Shatto v. Abernethy*, 29 id. 325; *Armstrong v. Killen*, 30 id. 14; *Maxon v. Chicago, M. & St. P. Ry. Co.*, 25 id. 144; *Nyce v. Shaffer*, 30 id. 943. See, also, *Caledonia Gold Mining Co. v. Noonan (Dak.)*, 14 id. 426; *Betts v. Glenwood*, 2 id. 1012; *Black v. Boyd*, id. 1044; *State v. Graham*, id. 1050; *Racine Basket Mfg. Co. v. Konst*, 7 id. 254; *Hall v. Castelbery*, 7 S. E. Rep. 706; *De Scoacht v. Dutcher*, 15 N. E. Rep. 459; *Barrett v. Delano*, 14 Atl. Rep. 288.

The damages were not too remote. *Wood, Railway Law*, 1368-1371; *Krippner v. Biebl*, 9 N. W. Rep. 671, 28 Minn. 139; *Johnson v. Chicago, M. & St. P. Ry. Co.*, 16 N. W. Rep. 488, 31 Minn. 57; *Milwaukee & St. P. Ry. Co. v. Kellogg*, 94 U. S. 256; *Brown v. Milwaukee & St. Paul Ry. Co.*, 54 Wis. 342 (affirmed by Supreme Ct. U. S.).

TEMPLETON, J. This case has been twice tried. The points raised by the first appeal were decided at the May, A. D. 1889, Term of this court.

The evidence adduced at the two trials was substantially the same, except, at the last trial, the connection between the forenoon and afternoon fire was more closely established, and it only appeared affirmatively that the north end of the forenoon fire was extinguished. A full statement of the facts, with that exception, will be found in the opinion of the chief justice rendered upon the former appeal. See *Pielke v. Railway Co.*, 5 Dak. 444, 41 N. W. Rep. 669. The jury returned a verdict for the plaintiff for the sum of \$1,500.79. A motion for a new trial was made and denied, and judgment was entered upon the verdict for the full amount of damages assessed by the jury. From this judgment the defendant has appealed.

After the testimony was closed and both sides had rested, the court was requested to direct a verdict for the defendant upon the

following grounds: "(1) that there is no evidence that the fire seen in the afternoon, and which caused the damage, was a continuation of the fire seen in the forenoon; (2) that there is not any testimony showing that the fire originated in or about any dry or combustible material on defendant's right of way." Defendant's motion was overruled, and an exception taken. It is urged that this ruling of the court was erroneous.

We have carefully examined the evidence, and are satisfied that there was sufficient testimony in the case tending to support the opposite of both propositions embodied in the motion to go to the jury, and, therefore, the ruling was correct.

The court, doubtless, instructed the jury correctly regarding these propositions, for no exceptions were taken to the charge relating thereto.

Appellant also claims that the verdict was excessive, and was the result of passion and prejudice. We do not think that this contention is established. Several witnesses placed the value of the property destroyed at an amount exceeding that found by the jury. It is true that other witnesses estimated the damages at a much lower figure. There was a substantial conflict in the testimony, and the verdict must stand.

We have now disposed of all the points raised by appellant's counsel in their assignments of error, but in their brief they make the point that the damages sustained were remote, and for that reason the judgment should be reversed.

It was practically upon this ground that the judgment was reversed when the case was here before. An examination of the record, however, forces us to the conclusion that this point was not saved at the last trial, and is not now before us.

As above suggested, there was sufficient evidence, at the last trial, connecting the fire alleged to have been set by defendant upon its right of way with the fire which did the damage, to prevent the trial court directing a verdict against the plaintiff upon the first ground mentioned in the motion made for that purpose; besides, remoteness of damages was not one of the grounds upon which said motion was based. In what manner, then, has the point been saved for review here? Certainly not because the charge of the court was silent upon the subjects of proximate



cause and remote damages. No exception whatever was taken to the charge as a whole, nor to any part of it. Furthermore, we must presume that the court instructed the jury correctly upon these questions, for it does not appear from the certificate of the trial judge attached to the statement of the case, that such statement contains the whole charge, nor a portion of it. The fact that something purporting to be the charge is printed in the abstract is not sufficient. We can look only to the authenticated record.

The charge of the court is not a part of the record proper, and can be made a part of the record only when incorporated in statement of the case or bill of exceptions. But granting that the whole charge is properly before us, and that it erroneously states the law, or fails to state the law upon these questions, how can we review it in the absence of any exceptions? The supreme court of Wisconsin, discussing this question, says: "A number of objections are taken to the charge of the court given at the trial. It is perhaps sufficient to say, in answer to all of them, that the record does not present a single exception to the charge; nor is it pretended that any was ever taken to it. But, notwithstanding this, the learned counsel for the defendant insisted that it was the duty of this court to review the charge, even though it was not excepted to, and, if found incorrect in the propositions of law laid down for the guidance of the jury, to reverse on that ground. That would be contrary to the uniform practice of this court since its organization. In no case, civil or criminal, has this court reviewed the charge of a trial court where no exception was taken to it." *Knoll v. State*, 55 Wis. 249, 12 N. W. Rep. 369.

The supreme court of California has said: "Whether the instructions which were given by the court were in any respect erroneous, matters not, for counsel failed to take any exception to any part of them." *Wilkinson v. Parrott*, 32 Cal. 102. See, also, *Russell v. Dennison*, 45 id. 337.

In a trial, the presiding judge is not to be held responsible for a failure of attorneys to advance certain theories in support of their side of the case. Attorneys, as well as judges, have important duties to perform. It seems to us that the point relating to the

remoteness of damages was waived by defendant. The case appears to have been tried upon the theory that defendant was liable for the loss; regardless of the principle *causa proxima non remota spectatur*, if it should be established that a fire was set upon defendant's right of way in combustible material negligently allowed to accumulate, and if such fire caused the one which consumed plaintiff's property.

The trial court cannot be criticised for failing to charge the jury regarding principles of law applicable to facts which were eliminated from the case, or rendered unimportant, by the acts or silence of appellant.

Judgment affirmed.

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KALSCHUEER, Respondent, v. UPTON ET AL., Appellants.

**1. Subrogation, Right of—When Allowed—Mortgages—Redemption.**

A., the owner of certain land on which there were two mortgages, conveyed it with covenants of warranty to B., who, before the delivery of the deed on representing he was the owner, mortgaged it to C. and D. and paid off the prior liens though it did not appear they were due. These mortgages were immediately recorded. Afterward, B., on the delivery of the deed, executed to A. a purchase-money mortgage, he having no knowledge of C. and D.'s mortgages. The deed and mortgage were at once recorded. Under § 1714, C. C., providing that "every person having an interest in property subject to a lien, has a right to redeem it from the lien, at any time after the claim is due, and before his right of redemption is foreclosed," *held*, as against the purchase-money mortgage, C. and D. were entitled to be subrogated to the rights of the prior lien-holders.

**2. Same — Time of Redemption.**

The provision in this section as to paying the lien "at any time after the claim is due," was made for the benefit of the lien-holder, and no one but him can object to its being paid before it is due.

(Argued February 11, 1889; determined and opinion filed October 10, 1889.)

**A** PPEAL from district court, Spink county; Hon. JAMES SPENCER, Judge.

*Winsor & Kittredge*, for appellants.

The only question in the case is, has a junior incumbrancer the right to pay off a superior lien and be subrogated to the rights of

its holder ? Section 1715, C. C., gives this right. It is not claimed but that the deed from the Kalscheuers to Susanna Keller and the mortgage from the Kellers to John Kalscheuer were all parts of one transaction, and it is admitted that any mortgage given by the Kellers prior to that time would be inferior to the purchase-money mortgage to respondent. But it is insisted that a mortgage given prior to this time would be, so far as money had been advanced upon it, a mortgage immediately secondary to the one for the purchase-money. § 1727, C. C. The liens then would be as follows: The \$1,200 mortgage to Smith ; the mortgage of \$189 to Miller ; the mortgage of \$2,350 to Kalscheuer, and then the mortgage from Kellers to Upton, nominally for \$2,000, but at that time only for the amount which had actually been advanced, about \$500. This would make the Smith and Miller mortgages senior to the Kalscheuer mortgage, and all of these three senior to the Upton mortgage, but there can be no pretense that the Upton mortgage was not a lien for the amount which had been advanced by him subject to these three prior liens. Upton and Clement then were no mere strangers to this title, having no rights or liens upon it. They were junior mortgagees with their liens inferior to the others. They had the right to pay off any or all of these incumbrances which were superior to their own, and to be subrogated to the rights of these superior mortgagees. In accordance with this right they did pay off the two mortgages, which were the first liens upon the premises. It is true they were under no personal obligation to pay the mortgages, but the estate in which they had an interest was liable. A junior incumbrancer who pays a prior lien is thereby subrogated to the security. *Ellsworth v. Lockwood*, 42 N. Y. 89, 96 ; § 1715, C. C. ; *Jones, Mortg.*, §§ 874, 876, 877. See, also, *Gans v. Thiems*, 93 N. Y. 225 ; *Hayes v. Ward*, 4 Johns. Ch. 123 ; *Wallen's Appeal*, 5 Barr, 103 ; *Knyer v. Knyer*, 6 Watts, 221 ; *Bispham, Equity*, §§ 336, 338 ; *Cheesborough v. Millard*, 1 Johns. Ch. 412.

*H. C. & T. J. Walsh*, for respondent.

Appellants must bring themselves within sections 1714, 1715, C. C. They are unable to do this for a number of reasons : There is no allegation, proof, or finding that the claim paid was due.

They did not pay it off to protect their own interest, that interest was in no danger from the prior liens they discharged.

It is contended a junior mortgagee may pay off a prior mortgage not yet due, and be subrogated to the rights of the mortgagee therein. The code discloses no such rule, and a careful examination of the authorities fails to reveal it. The statute merely gives expression to the equity rule. Subrogation, unless perhaps under peculiar circumstances, can arise only on redemption, and there can be no redemption until after forfeiture. *Ellsworth v. Lockwood*, 42 N. Y. 89, 97.

Appellants are mere volunteers. The fact that their money went to pay off prior liens gives them no equity. *Calbaugh v. Byerly*, 7 Gill (Md.), 354; *Downer v. Miller*, 15 Wis. 612; *Watson v. Wilcox*, 39 id. 643; *Gadsden v. Brown*, 1 Speer, 41; *Banta v. Garno*, 1 Sandf. Ch. 384; *Wilkes v. Harper*, 1 N. Y. 586; *Douglass v. Fagg*, 8 Leigh, 588; *Hough v. Insurance Co.*, 57 Ill. 318; *Small v. Stagg*, 95 id. 39.

. Further, at the time the original mortgage was paid off, respondent's mortgage was of record, and appellants must be deemed to have had notice of it. *Nat. Bank v. Thompson*, 34 N. W. Rep. 184; *Mather v. Jenswold*, 32 id. 512; *Goodyear v. Goodyear*, 33 id. 142; *Banta v. Garno*, 1 Sandf. Ch. 383.

**ROSE, J.** The facts in this case, as shown by the findings of the referee, the agreed statement of facts, and exhibits are as follows: On July 19, 1886, John Kalscheuer and Anna Mary Kalscheuer were and are now husband and wife. At that time John Kalscheuer was the owner of the S. E.  $\frac{1}{4}$  of section 9, township 117 N., of range 62 W. of the fifth P. M., and his wife was the owner of the S. W.  $\frac{1}{4}$  of the same section. On October 1, 1884, Kalscheuer and his wife executed and delivered unto John W. Smith, trustee for John H. Miller, a trust deed for \$1,200, and a mortgage to John H. Miller for \$189, on the above-described tract of land, both of which instruments were recorded on October 6, 1884. On June 22, 1886, Kalscheuer and his wife executed a warranty deed to Susanna Keller for the above-mentioned premises, subject to the trust deed to Smith, trustee, which Susanna Keller assumed and agreed to pay; but the deed was not delivered

until July 19, 1886, and it was recorded on July 21, 1886, and at the same time, to-wit, July 21, 1886, and as part of the same transaction, Susanna Keller and her husband, Jacob Keller, executed and delivered unto Kalscheuer a mortgage on the same premises for the sum of \$2,350.33, subject to the trust deed to Smith, trustee, which was given to secure the payment of that part of the purchase-price remaining unpaid. The consideration mentioned in the deed is \$3,500. The deed from Kalscheuer to Keller, and the mortgage from Kellers to Kalscheuer, were recorded simultaneously on July 21, 1886. Prior to the delivery of the deed from Kalscheuer to Keller, and on or about June 21, 1886, Susanna Keller and her husband executed and delivered to Hiram D Upton a mortgage upon the same premises for \$2,000, to secure a loan of that amount, evidenced by a note of even date with the mortgage, and at the same time they executed and delivered unto Foster R. Clement a mortgage on the same premises to secure a note for \$402.25, it being a part of the interest on the Upton note, both of which mortgages were recorded on the 23d day of June, 1886. At the time Upton and Clement made this loan to Susanna Keller she represented to them that she was the owner in fee of the said premises, and that they were free from incumbrance, excepting the trust deed to Smith, trustee, for \$1,200, and that she desired to pay it off with a part of the proceeds of the loan. Upton and Clement, relying upon these statements, made the loan to her, and on June 22, 1886, and prior to the execution and delivery of the mortgage to Kalscheuer, they paid her \$500, and on August 3, 1886, they paid \$1,412 for a release of the trust deed to Smith, trustee, and the balance of the loan they paid out for sundry purposes to different parties, for insurance, recording fees, abstract of title, and expenses. Upton and Clement, at the time the loan was made, had no knowledge of the existence of the trust deed to Smith, trustee, and the mortgage to Miller, and fully believed that Susanna Keller had an absolute and perfect title to the premises, and they made the loan in good faith. Neither did Kalscheuer have any knowledge, prior to January 1, 1887, of the existence of any mortgage upon the premises other than that of the trust deed of \$1,200 to Smith, trustee. When the note of Kellers to Kalscheuer for \$2,350.33

became due, and it was not paid, Kalscheuer commenced foreclosure proceedings, making Upton and Clement defendants.

The case was referred. The referee found the facts above given. The court confirmed the report of the referee, and found as conclusions of law, so far as relates to this case: (1) That the Kalscheuer mortgage was given to secure the payment of the purchase-price of the S.  $\frac{1}{2}$  of section 9, township 117 N., of range 62 W. of the fifth P. M.; (2) that the deed from the Kalscheuers to Susanna Keller, conveying the said premises, and the mortgage from Susanna Keller and husband to Kalscheuer, were executed, delivered, and recorded simultaneously; (3) that Kalscheuer had no notice, actual or constructive, before January 1, 1887, of the existence of either the mortgage to Upton or the mortgage to Clement; (4) that the lien of the mortgages of Upton and Clement is inferior and subordinate to the lien of Kalscheuer's mortgage — and rendered judgment in accordance with the above conclusions of law.

The defendants, Upton and Clement, appealed from the judgment rendered, and assign as error the following: “(1) That the findings of the referee and the agreed statement of facts do not sustain the conclusions of law. (2) That the court erred in declaring so much of the money paid by defendant Upton in satisfaction of the \$1,200 and \$189 mortgages, together with accrued interest, which was on the land prior to the sale of the land by Kalscheuer to Keller, inferior to the mortgage from Keller to Kalscheuer, and refusing to permit Upton to be subrogated to plaintiff [the prior lien-holders] for that amount.” There is no dispute as to the foregoing facts, as they are admitted by both appellants and respondent.

The only question submitted to this court for determination is whether Upton and Clement are entitled to be subrogated to the rights of the prior lien-holders, Smith, trustee, and Miller, or, in other words, are they entitled to an equitable assignment of their liens.

The respondent maintains in his argument that Upton and Clement should not be subrogated for the following reasons: (1) Because there is no allegation, proof, or finding by the referee that the mortgages paid by the appellants were due when paid.

(2) The appellants did not pay the said mortgages to protect their own interest. That their interest was in no danger from the prior liens which they discharged. (3) The appellants were mere volunteers in paying off the prior liens. (4) The appellants must be deemed to have had notice of the existence of respondent's mortgage. (5) That it is impossible to determine the amount for which they should have priority.

On the other hand, appellants urge in their argument that they should be subrogated for the reason that they paid the prior liens at the instance of Susanna Keller, who was primarily liable for their payment; that they had an interest in the premises, and sustained such relation, both to the owner and to the premises, as to entitle them to pay the liens, in order to protect their own interest; and that they were not mere strangers or volunteers, having no interest whatever in the premises, and that they are entitled to be subrogated, under the provisions of section 1715 of the Civil Code, and by the general principles of equity.

The first point made by respondent we think is not well taken. Section 1714 of the Civil Code reads as follows: "Every person having an interest in property subject to a lien has a right to redeem it from the lien at any time after the claim is due, and before the right of redemption is foreclosed."

We think that the condition expressed in the words "at any time after claim is due" was enacted for the benefit of the prior lien-holders, which right they could waive, if they chose to do so, by consenting to accept payment of their liens before they were due. No one except them could object to their liens being paid before they were due, and they do not complain. There is no charge that their liens were not valid; in fact it is admitted that they were valid. The abstract of title shows that their liens were paid and released of record.

The prior lien-holders must have consented to receive payment of their liens before they were due and paid, otherwise their release could not have been obtained, and the right of redemption had not been foreclosed; hence we think respondent has no reason to complain of the transaction. *Fears v. Albea*, (Tex.) 6 S. W. Rep. 286.



We think the second point made by respondent also is not well taken.

When Susanna Keller received her deed and title to the premises from Kalscheuer on July 19, 1886, such title inured to Upton and Clement as security for the \$500 which they had paid to her under their mortgage, then executed and recorded, under the provisions of that portion of section 1727 of our Civil Code which reads as follows: "Title acquired by the mortgagor subsequent to the execution of the mortgage inures to the mortgagee as security for the debt in like manner as if acquired before the execution."

Upton and Clement then became junior lien-holders to Smith, trustee, Miller, and Kalscheuer for at least the sum of \$500.

They became junior lien-holders to Smith, trustee, and Miller, because the mortgages of the former were given and recorded subsequent to the mortgages of the latter; and the mortgages of Upton and Clement were junior and inferior to that of Kalscheuer, although they were given and recorded prior to his, because Kalscheuer's mortgage was given for a part of the purchase-price under the provisions of section 1712 of our Civil Code, which reads as follows: "A mortgage given for the price of real property at the time of its conveyance has priority over all other liens created against the purchaser, subject to the operation of the recording laws."

Upton and Clement then being junior and inferior lien-holders to Smith, trustee, and Miller, they had a right to redeem from them under the provisions of section 1715 of our Civil Code, which reads as follows: "One who has a lien inferior to another upon the same property has a right— (1) to redeem the property in the same manner as its owner might from the superior lien; and (2) to be subrogated to all the benefits of the superior lien, when necessary for the protection of his interests, upon satisfying the claim secured thereby."

That it was necessary for Upton and Clement to redeem from Smith, trustee, and Miller in order to protect their interest is quite obvious, and it is practically admitted by respondent, for his counsel, in their argument, say that Kalscheuer's security for the payment of his mortgage of \$2,350.33 was always inadequate.

Less, then, would appellants' security be, and greater would the necessity be to protect their lien.

That Upton and Clement satisfied the liens of Smith, trustee, and Miller is admitted. No good reason can be imputed to Upton and Clement for paying the liens, other than that it was to protect their interest, and respondent should not complain of their having done so unless they paid more for the prior liens than was legally due thereon, and there is no claim nor proof that such was the case.

Nor do we think that the third point made by respondent is good. We think that it is apparent from the facts in the case that Upton and Clement had a *bona fide* interest in the premises which they had a right to protect, and that they were not mere strangers, meddlers, or volunteers to the premises in paying the prior liens.

With respect to the fourth point made by respondent we think it was immaterial whether Upton and Clement had notice of Kalscheuer's mortgage. Such notice would not affect their right to redeem and be subrogated if such they had.

It is admitted that the statement of facts made in the seventh paragraph of appellant's answer is true, and it is therein stated that appellants paid \$1,412 for the prior liens, and we think they are entitled to be subrogated for that amount, unless more was paid for the prior liens than was due thereon, and there is no charge nor proof that such was the case, which disposes of respondent's fifth and last point made.

Sections 1714 and 1715, cited above, declare the general doctrine of equity held by the courts of our country in respect to subrogation or equitable assignment in cases like the one here presented. Mr. Pomeroy, in his work on Equity Jurisprudence, says: "Equity does not admit the doctrine of equitable assignment in favor of every person who pays off a mortgage. Such relations must exist toward the mortgaged premises, or with the other parties, that the payment is not a purely voluntary act, but is an equitably necessary or proper means of securing the interests of the one making it from possible loss or injury. The payment must be made by or on behalf of a person who had some interest in the premises, or some claim against other parties, which he is entitled in equity

to have protected and secured. A mere stranger, therefore, who pays off a mortgage as a purely voluntary act, can never be an equitable assignee. In general, when any person having a subsequent interest in the premises, and who is, therefore, entitled to redeem for the purpose of protecting such interest, and who is not the principal debtor, primarily and absolutely liable for the mortgage debt, pays off the mortgage, he thereby becomes an equitable assignee thereof, and may keep alive and enforce the lien so far as may be necessary in equity for his own benefit. He is subrogated to the rights of the mortgage to the extent necessary for his own equitable protection. The doctrine is also justly extended by analogy to one who, having no previous interests, and being under no obligation, pays off the mortgage, or advances money for its payment, at the instance of a debtor party, and for his benefit. Such a person is in no true sense a mere stranger and volunteer." 3 Pom. Eq. Jur., § 1212, and cases cited therein; 1 Jones, Mort., § 877, and cases cited therein; Boone, Mort., §§ 136, 137, and many cases cited therein; Mosier's Appeal, 56 Pa. St. 76; Sanford v. McLean, 3 Paige, 117.

In the case of Fievel v. Zuber, 67 Tex. 275, 3 S. W. Rep. 273, the court say: "There are numerous decisions which recognize the doctrine that if a third party pay the entire debt in pursuance of an agreement between him and the debtor, upon his doing so he shall be subrogated to the creditor's rights, the agreement will be given effect, and such third party will stand in the place of the creditors as to all persons interested in the property or the security.

\* \* \* We have not found the rule otherwise except in the state of Louisiana, where the subject is governed by statute." See cases cited therein; also Crippen v. Chappel (Kan.), 11 Pac. Rep. 453, and cases cited; McNeil v. Miller (W. Va.), 2 S. E. Rep. 335, and cases cited; Yapple v. Stephens (Kan.), 14 Pac. Rep. 222, and cases cited; Rappanier v. Bannon (Md.), 8 Atl. Rep. 555; Muir v. Berkshire, 52 Ind. 149; Caudle v. Murphy, 89 Ill. 352; Young v. Morgan, id. 199; Bank v. Cheeney, 87 id. 602, 615. The case of Edwards v. Davenport, reported in 20 Fed. Rep. 756, holds the doctrine that a party who advances money to another that is used to discharge a valid pre-existing lien on real estate, if not a mere volunteer, is entitled by subroga-

tion to all the remedies which the original lien-holder possessed as against the property.

In the case of *Fievel v. Zuber*, *supra*, reported in 3 S. W. Rep. 273, it is held that when a debt is discharged under an agreement with the debtor, or under circumstances from which an agreement may be implied, the note shall be held until the money is repaid, and this although the creditor is not a party to the agreement the doctrine of subrogation is applied. *Lockwood v. Marsh*, 3 Nev. 138.

In view of all the facts in the case, we think that appellants are entitled to be subrogated to the rights of Smith, trustee, and Miller, the prior lien-holders, to the extent of the sum which they paid for the release of the prior liens, and that the court below erred in deciding that they were not entitled to be subrogated to their rights.

The case is, therefore, remanded to the court below, with direction that the judgment there rendered be modified in accordance with this opinion. All the justices concurring except Justice SPENCER, who did not sit in the case.

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ST. PAUL F. & M. INS. CO., Appellant, *v.* COLEMAN, Respondent.

1. Insurance — Premium Note — Liability.

An insurance note contained a provision "that in case of default in the payment of any of the installments herein, the whole amount remaining unpaid on the note shall immediately become due and payable." The application and policy were "for the period of five years," and provided that, "if any payment on the note given for premium hereon be not paid when due, the policy shall be void until the same is made, when it is to again attach." The assured made default in the payment of the first installment and the company brought an action on the note for the entire amount. *Held*, it could recover, and that assured was not entitled to a deduction for the alleged unearned premium maturing after the default.

2. Jurisdiction — Costs, Right to.

Section 5191, Comp. Laws, allows costs of course to the plaintiff in an action for money where he recovers \$50. It also allows costs to the defendant in such an action unless the plaintiff is entitled to them. *Held*, the effect of the section is not to limit the jurisdiction of the district courts and thereby be in conflict with the organic act, § 1866, Rev. St. U. S., conferring chancery and common law jurisdiction upon these courts. A party may bring such action in the district court, but if he recovers less than \$50 he will not be entitled to costs.

(Argued May 20, 1889; reversed May 31; opinion filed October 10, 1889.)

**A**PPEAL from the district court, Stutsman county; RODERICK Rose, Judge.

*C. E. Joslin*, for appellant.

The application was for insurance for five years. It complied with section 1518, sub. 6, C. C. See, also, § 934; *Chrisman v. State Ins. Co.*, 18 Pac. Rep. 466. The insured agreed that all payments should become due and payable immediately if any of them were not promptly met. There was no option given to the insured to discontinue the insurance, except by the clause providing that the insurer may cancel the policy by returning the unexpired premium *pro rata* — the insured, by paying all premium due at customary short rates. Respondent is not entitled to a return of the premium under section 1543, C. C. It cannot be said that the insurer never incurred any liability. The only way the company could be released was to cancel the policy and return the unexpired premium. The only way the insured could release himself was to have the policy canceled by paying the short rates and thus get a return of his note and a release from the payment of such part thereof as was not earned.

This is not a question as to the right of the insured to recover for a loss occurring while he is in default; it is whether the company, which is not in default, can recover on this note with its particular provisions. That it can, see *American Ins. Co. v. Klink*, 65 Mo. 78; *American Ins. Co. v. Henly*, 60 Ind. 515; *American Ins. Co. v. Charles*, 62 id. 210; *American Ins. Co. v. Elliott*, id. 211; *Williams v. Albany City Ins. Co.*, 19 Mich. 451; *Cauffield v. Continental Ins. Co.*, 11 N. W. Rep. 264; *Blackerby v. Continental Ins. Co.*, 83 Ky. 574; 36 N. Y. 157; 42 Ia. 239; 44 id. 240; 24 id. 239.

There are two cases in Michigan which appear to hold that a contract of insurance, similar in many respects to this, is a contract for one year; but in neither of those cases did default in the payment of one installment render the others earned, or due and payable. *American Ins. Co. v. Story*, 1 N. W. Rep. 877; *Yost v. American Ins. Co.*, 39 Mich. 531. See, also, *Matthews v. American Ins. Co.*, 40 Ohio St. 137.

The court erred in denying appellant costs and awarding them

to the respondent. The organic act confers on these courts jurisdiction for the purposes of hearing and determining all matters except those in which the United States was a party. § 1874; *St. Paul Fire & M. Ins. Co. v. Hanson*, 28 N. W. Rep. 193.

If section 381, C. C. Pro., denies costs in one case, and gives them in another where the court has jurisdiction, it is to that extent contrary to the organic act and void. The legislature cannot, in the face of section 1874, giving the district court jurisdiction in all amounts, confer on justices of the peace exclusive jurisdiction in any sum. If it cannot confer exclusive jurisdiction on justices directly it cannot do so indirectly by imposing a penalty upon the litigant, who chooses to bring his action in the district court, by denying him costs where the amount recovered is below a certain sum. § 379; *Hepworth v. Gardner*, 11 Pac. Rep. 566.

*Nickens & Baldwin, McMillan & Frye and S. L. Glaspell*, for respondent.

The policy was yearly on the installment plan for five years. *Am. Ins. Co. v. Stoy*, 1 N. W. Rep. 878; *Yost v. Am. Ins. Co.*, 39 Mich. 531.

The policy being suspended after default the company was under no liability. There was from that time a failure of consideration. C. C., § 1544; *Smith v. St. Paul Fire & M. Ins. Co.*, 3 Dak. 80; *Mathews v. Insurance Co.*, 40 Ohio St. 135; *Am. Ins. Co. v. Stoy*, *supra*; *Yost v. Am. Ins. Co.*, *supra*; *Joliffe v. Madison Mutual Ins. Co.*, 39 Wis. 111; *Union Mutual Ins. Co. v. McMillen*, 24 Ohio St. 82.

The whole premium had not been earned when the company's liability ceased. *Smith v. St. Paul F. & M. Ins. Co.*, *supra*; *Mathews v. Insurance Co.*, *supra*; *Joliffe v. Madison Mutual Ins. Co.*, *supra*.

The appellant recovering less than \$50 the respondent was entitled to costs. Comp. L., § 5191, subd. 4. The organic act is silent as to costs. At common law they were not allowed, and are awarded by virtue of statute alone. *Gibson v. Memphis*, 31 Fed. Rep. 553. The section was designed to discourage, not prohibit the bringing of petty suits in the district court. It does not interfere with the jurisdiction either directly or indirectly. Sections

5186, 5189, 5191, when construed together, show that "costs are to be allowed to the prevailing party" if he recovers \$50 or more, and not otherwise. *Landsberger v. The Magnetic T. Co.*, 8 Abb. Pr. 35. To deprive a suitor of costs does not impair the jurisdiction of the court. *Busby v. Carpenter* (Wash.), 3 Pac. Rep. 193; *Cressy v. Gierman*, 7 Minn. 398; *Agin v. Heyward*, 6 id. 110; *Cartner v. Chandler*, 2 id. 86.

CROFOOT, J. The plaintiff brings this action to recover on an installment note, given by the defendant for insurance premium. The note is dated May 27, 1884, and contains the promise to pay plaintiff \$8.40 on the first day of July of each of the years 1885, 1886, 1887 and 1888, and also contains the following clause: "This note being given as consideration for insurance under the above-named policy, I consent that, in case of default in the payment of any of the installments named herein, the whole amount remaining unpaid on this note shall immediately become due and payable."

The application for insurance is in writing, signed by the defendant, and is headed, "Application of T. W. Coleman \* \* \* for insurance against loss by fire and lightning \* \* \* for the term of 5 yrs. from the day of approval of this application by the general agent of the company."

The application contains an express agreement that "if any payment on the note given for premium hereon be not paid when due, the policy shall be void until the same is made, when it is to again attach."

The policy shows that it is issued in consideration of \$8.40, and the installment note sued on, and insures defendant's property from the 29th day of May, 1884, at twelve o'clock at noon, to the 29th day of May, 1889, at twelve o'clock at noon. The policy contains this provision: "It is expressly agreed that this company shall not be liable under this policy for any loss or damage if any default shall have been made in the payment of any note, or installment of any note in full, given in payment or part payment of premiums under this policy; provided, however, that on the payment by the assured, or his assigns, of all such notes, or installment of any such note in full, the liability of the company



under this policy shall again attach, and the policy shall thereafter be enforced, unless the same shall be inoperative or void from some other cause ; but in no event shall this company be liable for any loss or damage happening during the continuance of such default of payment." It also provides : "This company may at any time cancel this policy, returning the unexpired premium *pro rata*. The assured may at any time have this policy canceled by paying all premiums due therefor, at customary short rates, for the time the policy has been issued."

The defendant contends that, by the terms of the policy, the plaintiff was under no liability after July 1, 1885, at which time, without fraud on his part, the defendant made default in the payment of the installment due at that time, and that the whole premium has not been earned, but only a *pro rata* portion of it. To support this position, the defendant relies upon the following authorities: *Yost v. Insurance Co.*, 39 Mich. 531; *Insurance Co. v. Stoy*, 1 N. W. Rep. 877; *Matthews v. Insurance Co.*, 40 Ohio St. 135; *Joliffe v. Insurance Co.*, 39 Wis. 111; *Smith v. Insurance Co.*, 3 Dak. 80, 13 N. W. Rep. 355.

The first three cases cited are the only ones that pass directly upon the right of the insurer to collect a premium installment where, by the terms of the contract, the policy is void during the continuance of default in the payment of any installment.

The contracts considered in these cases were all made with the same company, and are identical. There was no provision in the note, policy, or application that, if default should be made in the payment of any installment, the whole note should immediately become due, or the whole premium should be considered as earned. The policy, however, contained a clause that the charter of the company was to be resorted to and used to explain the rights and obligations of the parties thereto, in all cases not therein otherwise specially provided for ; and the charter provided that, on non-payment of any installment, the whole note should immediately become due.

In *Yost v. Insurance Co.*, *supra*, suit was brought to recover past-due installments, and a statement of facts was agreed upon, which contained only the note and the policy, but not the charter. The court, in construing the contract, held it to be an absolute insur-

ance for one year only, which might be continued and kept in force from year to year thereafter, for a period of five years, by paying an annual premium; that the company had declared, by its policy, what the effect of a default should be; that it gave the insured the right to come in and have the policy revived, and it was optional with the insured to pay or not. In conclusion, the court expressly distinguishes it from the case of *Williams v. Insurance Co.*, 19 Mich. 462, by the absence of an express stipulation that "in case the notes or obligation given for the premium, or any part thereof, be not paid at maturity, the full amount of premium shall be considered as earned," and the policy void during default.

In *Insurance Co. v. Stoy*, *supra*, the question again came before the supreme court of Michigan upon the claim that new and important facts were presented by the record which distinguished it from *Yost v. Insurance Co.*, *supra*, and brought it within the decision in *Williams v. Insurance Co.*, *supra*.

The new and important facts referred to were the provision of the charter of the company that, if default should be made in the payment of any installment, the whole note should immediately become due; and the clause in the policy, above cited, referring to the charter. The court held, however, that the charter did not form a part of the contract; that the rights and obligations of both parties, so far as was in issue in that case, were fully and expressly provided for in their agreement; and that the provision of the charter could neither enlarge, vary, nor change the written obligation; and that to so hold would be to permit an instrument, not seen and inspected, to change, in important matters, by mere reference thereto, the deliberate agreement which the parties had entered into. In an elaborate opinion, the court adhered to its former construction of the contract as an insurance from year to year, and after citing other reasons against the plaintiff, relative to its right to do business in the state, affirmed its former decision.

In *Matthews v. Insurance Co.*, 40 Ohio St. 135, it was held, principally on the authority of the Michigan cases, but by a divided court, that the charter did not form a part of the contract; and, there being no express provision to the contrary, when the insurance ceased the premium ceased to accrue.

What conclusion these courts would have reached had the stipulation in the charter been embraced in the note, as in the case now before us, it is of course impossible to say. That they regarded as important a clause giving the company the right to the premium, notwithstanding the policy was void during default, is evident from the care with which they distinguish the case of *Williams v. Insurance Co.*; and when the question again came before the supreme court of Michigan, in *Cauffield v. Insurance Co.*, 11 N. W. Rep. 264, upon a note providing that, in case of non-payment of any one of the installments at maturity, the whole amount of installments remaining unpaid should be considered as earned, the company was allowed to recover. That they would have reached a different conclusion seems probable, not only from the language used, but also from the fact that in *Insurance Co. v. Klink*, 65 Mo. 78, and *Insurance Co. v. Henley*, 60 Ind. 515, in construing the same contract, the provision in the charter above referred to being held by the courts of Indiana and Missouri to be a part of the agreement, it was held that the plaintiff was entitled to recover, notwithstanding the company had been released from liability during the default.

The other cases cited by defendant's counsel only involve the question of waiver, where the company had accepted payment of a past-due note, with notice of a loss.

It seems to us that the construction of this contract is very plain, and we are unable to construe it to be other than a contract of insurance for five years, as every clause seems to indicate such intention. The defendant applied for insurance for five years. The plaintiff gave an installment note, which contained a provision that, in case default was made in the payment of any installment, the whole note (which presumably represented four years' premium) should immediately become due. The policy, upon its face, insures the property for five years, from a day certain to a day certain, on condition that the company should not be liable during default in the payment of any installment of the premium. The insured had the right to have the policy canceled upon paying the premium due thereon, at customary short rates. To hold it to be a policy from year to year would not only be doing violence to the plain language in which the parties have expressed

their intention, but it would also lead to the absurd conclusion that, while the insured had the option to renew the insurance each year by paying an annual premium, still, if he failed to do so, the premium for the remaining years would immediately become due, and, when collected, the insurance would be revived for the whole term, whether he desired to exercise his option or not.

There is nothing unfair or unreasonable in the stipulation that the company shall not be liable for loss during default in the payment of the premium; and there is nothing contrary to public policy, or prohibited by statute, in the agreement that, although the insurer is relieved from liability by default, the premium note of the assured remains binding upon him. Neither is there any thing particularly harsh in such a contract, since the insured, if he finds himself unable to continue his payments, can at any time have the policy canceled by paying the premium due at customary short rates. The parties have the right to make their own contract, and fix its terms and conditions; and such a contract has frequently been upheld by the courts. *Williams v. Insurance Co.*, 19 Mich. 462; *Blackerby v. Insurance Co.*, 83 Ky. 574; *Wall v. Insurance Co.*, 36 N. Y. 157; *Cauffield v. Insurance Co.*, 11 N. W. Rep. 264.

But the defendant further claims that he is entitled to a reduction of the amount recoverable by the terms of the note, by the principles which apply to the return of premiums, claiming that "risk and premium go hand in hand, and, one ceasing, the other also ceases." This is not by any means true. If the premium had been paid, and the risk incurred, for any period, no matter how short, no breach of a subsequent condition for which the assured was responsible would entitle him to a return of any of the premium, although the company thereby ceased to be liable. The law relating to the return of premiums is clearly laid down in our Civil Code, §§ 1542-1544, and we are not aware that it differs materially from the general law of insurance elsewhere. Section 1542: "A person insured is entitled to a return of premium, as follows: (1) To the whole premium, if no part of his interest in the thing insured be exposed to any of the perils insured against; (2) where the insurance is made for a definite

period of time, and the insured surrenders his policy, to such proportion of the premium as corresponds to the unexpired time, after deducting from the whole premium any claim for loss or damage under the policy which has previously accrued."

Section 1543: "A person insured is entitled to a return of the premium when the contract is voidable on account of the fraud or misrepresentation of the insurer, or on account of facts of the existence of which the insured was ignorant without his fault; or when, by any default of the insured, other than actual fraud, the insurer never incurred any liability under the policy."

Section 1544: "If a peril insured against has existed, and the insurer has been liable for any period, however short, the insured is not entitled to return of premiums, so far as that particular risk is concerned."

We cannot see how section 1544, which is particularly referred to by defendant's counsel, in any way sustains his position. The words, "so far as that particular risk is concerned," do not refer to the time in which the subject is exposed to the peril; but where a premium is applicable to risks on two or more distinct subjects of insurance, and no risk has ever been incurred upon one subject, the proportionate premium may be recovered. This is evident, not only from the reading of the previous sections, but from the history of the legislation which led to the adoption in the Code states of section 1542. This section, as originally adopted in California, read: "A person insured is entitled to a return of premium paid, or a ratable proportion thereof, if no part of his interest in the thing insured is exposed to any of the perils insured against, or where the insurance is made for a definite period of time, if it is not exposed to such peril for the whole of that time."

In proposing as an amendment the language of section 1542, the Code examiners said: "The present section does not conform to the general rule and the law elsewhere, and is manifestly unjust. Under it, the insured, meeting with a loss in the first month of a policy for a year, could recover not only the loss but eleven-twelfths of the premium, thus depriving the insurer of that proportion of the consideration for which he assumed the risk."

If the defendant had sustained a loss during the first year, the

premium for which had been paid in cash, he would have been liable on his note, because the peril had existed, the insurer had been liable, and the event insured against, in consideration of the entire premium, had happened.

This being an insurance for five years, and the risk having attached, the insured is not entitled to any reduction on his note.

As a new trial must be granted, the question in relation to costs, presented on the hearing, will again come before the trial court, and it is deemed advisable to indicate our views thereon.

The organic law gives to the district courts chancery, as well as common-law, jurisdiction, and limits the jurisdiction of justices of the peace to matters in controversy where the debt or sum claimed does not exceed \$100. It also provides that the jurisdiction of these courts shall be limited by law. This court, in *Insurance Co. v. Hanson*, 28 N. W. Rep. 193, held that, under the organic law and the acts of the territorial legislature, in all actions arising on contracts for the recovery of money only, where the amount claimed does not exceed \$100, the district courts and justices of the peace have concurrent original jurisdiction.

Section 5191, Comp. Laws Dak., allows costs of course to the plaintiff, in an action for the recovery of money, where he recovers \$50, and allows costs of course to the defendant, in such an action, unless the plaintiff is entitled to costs. It is claimed that the effect of this section is to indirectly limit the jurisdiction of the district courts to \$50 by denying the plaintiff costs, and allowing the defendant costs, where the amount recovered is below that sum.

We cannot concur in this position. That the legislature had the power to limit the jurisdiction of the district court, if they had so desired, we cannot doubt, in the face of section 1866, Rev. St. U. S., expressly conferring that power. They have not done so directly, nor, in our opinion, does this section have any such effect upon the jurisdiction of the court indirectly. At the common law, costs were unknown. They are purely the creatures of statute. *Eastman v. Sherry*, 37 Fed. Rep. 844; *Gibson v. Railroad Co.*, 31 id. 553.

The legislative power is expressly extended to all rightful subjects of legislation; and that the allowance or refusal of costs in

judicial proceedings is such a subject we cannot doubt. The exercise of that power in no wise affects the question of jurisdiction. If the suitor desires to present his claim, he may avail himself of either court, and jurisdiction could not be denied; but he must accept such costs as the legislature has provided for that court. *Busby v. Carpenter*, 3 Pac. Rep. 193. The judgment of the district court is hereby reversed, and a new trial ordered. All the justices concur, except ROSE, J., not sitting.

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WATERBURY, Respondent, *v.* DAKOTA F. & M. Ins. Co., Appellant.

**Insurance — Warranty — Statement of Agent.**

In an action against an insurance company for a loss sustained by fire, it appeared, by an agreed statement of facts, that the assured warranted the statements in his application true so far as known and material to the risk; that in answer to the question, "Do all stove-pipes pass into good brick chimneys?" he answered, "One in iron pipe four inches from wood. Will build chimney in spring." That the company's agent in answer to a question to him in the application (and which was a part of the application) pronounced the stove-pipe perfectly safe and advised the risk; assured did not build the chimney in the spring and continued the use of the pipe thereafter when the fire occurred, being first discovered in the roof of the insured building. *Held*, the company was liable for the loss.

(Argued Feb. 11, 1889; affirmed Feb. 19; opinion filed Oct. 10, 1889.)

**A** PPEAL from the district court, Davison county; Hon. BARTLETT TRIPP, Judge.

*Dillon & Preston*, for appellant.

The only question is, did the omission to build the chimney avoid the policy? By their contract the application is made a part of it. The effect of this is that what would otherwise be mere representations are converted into warranties. *Cushman v. U. S. Ins. Co.*, 63 N. Y. 407. Warranties must be strictly and literally complied with. *Bartean v. Phoenix Ins. Co.*, 67 N. Y. 595; *Wood, Ins.* 313; *Byers v. Farmers' Ins. Co.*, 35 Ohio St. 606; *Jeffries v. Life Ins. Co.*, 22 Wall. 47; *Davenport v. New Eng. Ins. Co.*, 6 Cush. 340; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136.

The statement of respondent, was a promissory warranty binding



on him, and its falsity, is as fatal as though it had been a statement of an existing fact. *Ripley v. Ætna Ins. Co.*, *supra*; *Houghton v. Ins. Co.*, 8 Metc. 114; *National Bank v. Ballston Ins. Co.*, 50 N. Y. 45; *Sheldon v. Hartford Ins. Co.*, 22 Conn. 235; *Murdock v. Chenango Ins. Co.*, 2 N. Y. 210; *Glendale Woolen Co. v. Ins. Co.*, 21 Conn. 19; *Blumer v. Phoenix Ins. Co. (Wis.)*, 4 N. W. Rep. 674; *Poor v. Humbolt Ins. Co.*, 125 Mass. 274; *Schultz v. Mutual Ins. Co.*, 10 Ins. L. J. 171; C. C., §§ 1534, 1535, 1536; *Wood*, 317, 319, 340.

A warranty is in the nature of a condition precedent; if it is violated the policy is avoided. It makes no difference whether it was connected with the risk or not. *Mead v. North-Western Ins. Co.*, 7 N. Y. 530; *Murdock v. Chenango Ins. Co.*, *supra*; *Liverpool Ins. Co. v. Gunther*, 116 U. S. 113.

*T. H. Null*, for respondent.

The application contains merely a statement of the expectation or belief of the applicant, and was not in response to any question, but volunteered. C. C., §§ 1508, 1536; *Buel v. Conn. M. L. Ins. Co.*, 5 Law Ins. J. 274; *Hough v. City F. Ins. Co.*, 29 Conn. 10; *Protection Ins. Co. v. Harmer*, 2 Ohio St. 452; *Commonwealth v. Moninger*, 18 Ind. 352; *Lycoming v. Mitchell*, 48 Pa. St. 367; *Herrick v. Union Mut. Ins. Co.*, 48 Me. 558; *New York v. Brooklyn Ins. Co.*, 4 Keyes, 465. It did not constitute a warranty as it was not material to the risk. Further, a statement in respect to future acts or omissions differs from an express warranty. C. C., §§ 1535, 1536. See, also, § 1499; *Hough v. City Ins. Co.*, *supra*; *Columbia Ins. Co. v. Lawrence*, 10 Peters, 507.

The words in the application "so far as the same are known to the applicant and material to the risk," eliminate from the contract the rule that the least misrepresentation, or breach of warranty, whether material or not, avoids the policy. *Garcelon v. Hampden Ins. Co.*, 50 Me. 580; *Ætna Ins. Co. v. Grube*, 6 Minn. 82; *First National Bank v. Hartford Ins. Co.*, 7 Ins. L. J. 208; *Kerr v. Hastings Mut. Ins. Co.*, 41 Up. Can. Q. B. 217.

CROFOOT, J. This action is brought to recover on a fire insur-

ance policy issued by the defendant upon plaintiff's dwelling-house and personal property.

The answer sets forth several defenses, but the only one relied upon, in the argument before this court, is an alleged breach of warranty on the part of plaintiff in not building a brick chimney upon the house in the spring of 1885, whereby the defendant seeks to avoid liability for the loss.

The case was submitted to the trial court upon an agreed statement of facts, which includes the fact that plaintiff never built a chimney, as set out in his answer to question No. 5 of the application; and also includes the application and policy.

The application for the insurance, signed by the applicant, contains the following question and answer: "*Question 5. Do all stove-pipes pass into good brick chimneys? Answer. One in iron pipe, four inches from wood. Will build chimney in spring.*" The application also contains the following: "And the applicant hereby covenants and agrees to and with said company that the foregoing is a true and full statement of all facts in regard to the condition, value and risk of the property to be insured, so far as the same are known to the applicant and material to the risk." The record also shows the following as a portion of the application: "Questions to agents. *Question 5. Did you carefully examine stove-pipes and chimneys? Q. 6. Do you regard them as perfectly safe? Answer. Yes. Q. 7. Do you fully recommend the risk? A. Yes.*"

The policy contains the following provision: "It is expressly agreed that the application of even number herewith, on file in the office of this company, shall be considered a part of this contract, and a warranty by the assured, and to which application reference is here made for a more particular description of said property insured; and any false representation by the assured of his interest in the property, the condition, situation or occupancy of the property, or omission to make known every fact material to the risk," etc., shall render the policy void.

The nature of the defense necessarily involves an interpretation of the contract of insurance, for the purpose of ascertaining whether the words, "will build chimney in spring," contained in

the application, amount to a warranty by the assured, or whether they are a mere representation.

A representation is a statement, collateral to the contract, of some fact having reference thereto, and upon the faith of which the contract is entered into. It precedes the contract, and, being only an inducement thereto, it need only be true as to matters material to the risk and that influence the insurer in taking or rejecting the risk, or in fixing the rate of premium therefor. The assured is not held to the strict or even literal truth of his representations. 1 Wood, Ins., § 192. "It is enough," says SUTHERLAND, J., in *Insurance Co. v. Cotheal*, 7 Wend. 82, "if a representation be made without fraud, and be not false in any material point, or if it be substantially, though not literally, fulfilled."

"An express warranty," according to the definition of Arnould, "is a stipulation in writing, on the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends." When the policy refers to the application, and adopts it as a part of the insurance contract, the statements in the application, relative to the situation, use and character of the risk, have the same force and effect as if written on the face of the policy, and are to be considered warranties, unless from the language used it is evident that the parties did not intend them to operate as warranties, but as representations. From this it appears that the statements in the application are in the nature of warranties; indeed, they are so declared in the policy.

In the absence of statutory provisions to the contrary, the well-settled law of insurance is that a warranty is in the nature of a condition precedent, whereby the assured stipulates for the absolute truth of the statement made, or the strict compliance with some promised line of conduct, on penalty of his forfeiture of his rights to recover, entirely without regard to the question of materiality to the risk. Says Mr. May, in his work on Insurance: "One of the very objects of the warranty is to preclude all controversy about the materiality or immateriality of the statement. The only question is, has the warranty been kept? There is no room for construction; no latitude; no equity." § 156. The harshness of this doctrine has been frequently recognized, but, as

it was held to be founded in the contract of the parties, the courts have adhered to it, and have felt themselves powerless to relieve against it, except in the interpretation of the contract itself. Having indemnity for its object, the contract is construed liberally to that end; and no rule is better settled, or more imperative and controlling, than that it is to be interpreted liberally in favor of the assured, so as not to defeat, without a plain necessity, the indemnity, which, in making the insurance, it was his object to secure. So where doubt exists as to whether a warranty or a representation is intended, and the language is susceptible of both interpretations, it will be held to be a representation so as to allow the assured to take advantage of its immateriality or its substantial truth. *May, Ins.*, §§ 174, 175; 1 *Wood, Ins.*, §§ 169, 185; *Wilson v. Insurance Co.*, 4 R. I. 156; *Insurance Co. v. Slaughter*, 12 Wall. 404.

Although continuing to hold that the materiality of an absolute warranty could not be questioned, the courts recognize the right of the parties to qualify or limit the effect of the warranty by the terms of their contract, and that is exactly what the parties have done in this case, by the statement in the application "that the foregoing is a true and full statement of facts in regard to the condition, value and risk of the property, so far as the same are known to the applicant and material to the risk." In *Redman v. Insurance Co.*, 47 Wis. 89, 1 N. W. Rep. 393, in construing a policy and application containing the same provisions as in this case, *LYON, J.*, in delivering the opinion of the court, says: "By the terms of the policy the application is made a part of it. The two instruments are, therefore, parts of the same contract, and must be construed together, as though all of the statements and stipulations contained in each were written in one instrument; hence the stipulation at the close of the application must be treated as if written in the policy. It is manifest that such stipulation is not qualified or changed by any thing in the policy. The condition therein that the application shall be considered a warranty by the assured means just such a warranty as is stipulated in the application; no more and no less." In *Garcelon v. Insurance Co.*, 50 Me. 580, Chief Justice APPLETON, in construing similar provisions in a policy and application, says: "If this is to be re-

garded as a warranty, it is one the limitations of which are clearly expressed in the application. It is not an absolute warranty that each answer is true, but only that the answers are a just and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property, so far as the same are known to the applicant and are material to the risk." See, also, *Lindsey v. Insurance Co.*, 3 R. I. 157; *Elliott v. Insurance Co.*, 13 Gray, 139; *Prieger v. Insurance Co.*, 6 Wis. 88; and *Insurance Co. v. Grube*, 6 Minn. 82 (Gil. 32), — where similar provisions are held to constitute a warranty limited to matters known to the assured and material to the risk.

So far as the question of materiality is concerned, the parties have, by their contract, only limited the warranty in the manner that all warranties are now limited by the Code. The effect of sections 4160, 4162, 4163, Comp. Laws, is to incorporate into all warranties the element of materiality, unless the policy expressly declares that the violation of a specified provision shall avoid it. The purpose of these sections was to relax the rule requiring the strict performance of immaterial conditions in the contract. See Civil Code Cal., § 2611, annotated by Creed Haymond and John C. Burch of the California Code commission. Mr. Barber, in his *Principles of Insurance*, says: "The introduction into the law of insurance of the doctrine of immaterial warranties effects a radical change in the significance heretofore attached to the term 'warranty.' If the materiality of a warranty is left open to inquiry, the only substantial distinctions remaining between a warranty and a representation are that the former must constitute a part of the policy, and must be strictly fulfilled, while the latter precedes the issuing of the policy, does not form a part of it, and requires only a substantial fulfillment. So that a warranty, according to this section of the Code, except on points just mentioned, is identical with a representation."

In the absence of statute, where the warranty is qualified by the contract, as in this case, it is said to be reduced to the quality of a representation. See *May, Ins.*, § 161, and also *Insurance Co. v. Grube*, *supra*, where it is said: "The warranty, therefore, of the statements contained in the application, is not an absolute warranty that they are as stated, but only that they are true so

far as the same are known to the applicant, and material to the risk, which qualifies the warranty, and gives it the same effect as a representation of the facts would have."

What, then, is the test of the materiality of a warranty? The test of the materiality of a representation or concealment is well settled both by the courts and by the provisions of our Code. Says Chief Justice SHAW in *Daniels v. Insurance Co.*, 12 Cush. 425: "And every such fact untruly asserted or wrongfully suppressed must be regarded as material, the knowledge or ignorance of which would naturally influence the judgment of the underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of premium." See, also, Comp. Laws, §§ 4123, 4139: "Materiality is to be determined, not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries."

It will be noticed that this test of materiality is found in article 5, tit. 11. pt. 4, Civil Code, which relates to concealment and representation, and is not directly referred to in article 7, which relates to warranties; and the question naturally arises as to whether such is also the test of the materiality of a warranty, in view of its modified character. Bearing in mind the inherent distinction which still exists between a representation and a warranty,—*i. e.*, that a representation is collateral to the contract, precedes it, and is only matter of inducement, while a warranty is part of the contract itself—it would seem to follow that a warranty would be material, if its breach increased the risk or hazard, *i. e.*, created a more dangerous class of risk than it otherwise would be; but since from the character of the insurance business the class or degree of the risk would in the very nature of things be determined and solely graduated by those matters which induce or influence the insurer in accepting a risk and fixing the premium, the test of the materiality of a warranty must be substantially the same as for representation. This seems to be the view taken by the courts in regard to the materiality of warranties qualified by contract, as in this case. In *Elliott v. Insurance Co.*, *supra*, BIGELOW, J., in construing such a warranty, says: "These

stipulations were not only unnecessary, if the assured was to be held to the literal and exact truth of his answers, but are inconsistent with holding them strict warranties. The parties to the contract did not so regard them. It was only so far as they were material to the risk, or were misrepresentations or suppressions of material facts, that they were intended to affect the rights of the assured to recover on the policy. The plaintiff was, therefore, entitled to have the question whether the rags kept in the store at the time of the fire materially affected the risk passed upon by the jury."

Although not referred to by counsel upon the argument, we cannot overlook a class of cases that are often incorrectly cited as holding that, if representations are put into the form of answers to specific questions, the parties have settled for themselves that they shall be deemed material, and that the assured cannot show the immateriality of a fact which both parties have treated as material, and that the question and answer must be held by the court as tantamount to an agreement that the matter inquired about is material. See *Wilson v. Insurance Co.*, 4 R. I. 141; *Campbell v. Insurance Co.*, 98 Mass. 381; *Miller v. Insurance Co.*, 31 Ia. 216; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *Price v. Insurance Co.*, 17 Minn. 497 (Gil. 473); *Jeffries v. Insurance Co.*, 22 Wall. 47; *Insurance Co. v. France*, 91 U. S. 512; *Conover v. Insurance Co.*, 3 Dill. 218.

An examination of these authorities discloses that they depend generally upon the fact that, by the form of the application and the policy, the assured stipulates for the absolute truth of all the answers to the questions in the application (which is declared to be the basis of the policy), and it is agreed that the policy shall be void if any of the answers are false.

In *Jeffries v. Insurance Co.*, *supra*, HUNT, J., says: "The stipulation is not expressed to be made as to important or material statements only, or to those supposed to be material, but as to all statements." This clearly indicates the grounds upon which these decisions are placed.

It is true that in *Miller v. Insurance Co.*, *supra*, language is used which would seem to indicate that in all cases the question and answer amount to an implied agreement that the matters in-



quired about are material, but since the case under consideration was one where the applicant had stipulated for the absolute truth of all answers in the application, and the authorities cited by the court were placed solely upon the ground that the parties had by their contract settled the question of materiality for themselves, we think it should be limited to such cases. Clearly this could not be the rule where the contract expressly includes the element of materiality, as in this case. That such a construction was placed upon this class of cases is evident from the reading of section 4163, Comp. Laws: "A policy may declare that a violation of specified provisions shall avoid it; otherwise the breach of an immaterial provision does not avoid the policy." The courts have universally held that where warranties were qualified, as in this case, the burden is upon the company to show the knowledge of the applicant, and the materiality of the facts, and the applicant is entitled to have these questions passed upon by the jury. See *Garcelon v. Insurance Co.*, *supra*; *Lindsey v. Insurance Co.*, *supra*; *Elliott v. Insurance Co.*, *supra*; *Redman v. Insurance Co.*, *supra*. This is also the settled law in relation to the materiality of a representation. *Huguenin v. Rayley*, 6 Taunt. 186; *Insurance Co. v. Harmer*, 2 Ohio St. 452. But "in all cases where the facts are specially found by the jury, or are without dispute, the question of the materiality to the risk of the representations made by the assured at the time of obtaining the insurance is for the court." *Ryan v. Insurance Co.*, 46 Wis. 674, 1 N. W. Rep. 426.

What, then, are the facts found by the court? Briefly stated, they are, in effect, that the plaintiff applied for insurance, and, on being asked if all stove-pipes passed into good brick chimneys, replied: "One in iron pipe, 4 inches from wood; will build chimney in spring." That plaintiff warranted the statements in the application true, so far as known and material to the risk. That the company's agent, in answer to a question propounded directly to him, pronounced the stove-pipes and chimneys perfectly safe, and recommended the risk, and these statements were a part of the written application. That the policy was issued upon the application. That plaintiff never built the chimney, and that at the time of the alleged fire the kitchen stove was actively in use

for baking purposes, and the fire was first discovered in or near the roof of the house. This is all.

Did plaintiff's failure to build a chimney increase the risk, so as to impose upon the company a different and greater hazard than that which, in issuing the policy, they assumed? It did, if the statement, "will build chimney in spring," induced it to enter into the contract, or to take it at a lower premium, or if it would probably have had that effect. The statement, "will build chimney in spring," is one which, from its very nature, is so closely connected with the character of the risk, and from the ordinary knowledge of mankind, one which would, if complied with, so manifestly tend to diminish the hazard, that the court, in the absence of other circumstances, would, without proof, feel compelled to say that it would probably and reasonably influence the insurer in forming his estimate of the disadvantages of the contract, and we should agree with the opinion of STRONG, J., in *Murdock v. Insurance Co.*, 2 N. Y. 210. But the question in this case is not whether such a statement, standing alone, would be material, but whether the statement, taken in connection with the attending circumstances, is material.

We cannot disregard the fact that before issuing the policy the defendant's agent, acting strictly within the scope of his authority, examined the stove-pipes and chimneys, pronounced them perfectly safe, and fully recommended the risk. Without any proof as to the purpose for which such examination is usually made by an agent, or the influence which his report ordinarily has upon the company in accepting or rejecting the risk, or in fixing the rate of premium, this court cannot assume that the statement made by the plaintiff in his application, which was entirely voluntary and not in response to any direct question as to his intentions, had any influence whatever upon the defendant in estimating the disadvantages of the risk, or would ordinarily influence any insurer, under like circumstances. If we suppose the underwriter to have been an individual, and he had satisfied himself, by a careful examination of the premises, that the chimneys were perfectly safe and the risk a good one, clearly such a statement by the assured, as to the future improvement of the chimneys, could have no effect upon him in estimating the disadvantages of the risk.

But even if the statement could, from its nature, be considered as material, it would seem that the company could not avoid the policy on that account, as it would be estopped from claiming that to be material which their agent has, in effect, declared to be immaterial.

It is too well settled to be now questioned that the company, or its agent acting within the scope of his authority, may waive any of the conditions of the policy, and if at the time of issuing the policy the company or such agent knows the falsity of a representation made by the applicant in procuring the insurance, the company is estopped from asserting its falsity in order to avoid liability. See *Plumb v. Insurance Co.*, 18 N. Y. 392; *Benedict v. Insurance Co.*, 31 id. 389; *Rowley v. Insurance Co.*, 36 id. 550; *Beal v. Insurance Co.*, 16 Wis. 241; *Miner v. Insurance Co.*, 27 id. 693; *Roberts v. Insurance Co.*, 41 id. 321; *Devine v. Insurance Co.*, 32 id. 471; *Winans v. Insurance Co.*, 38 id. 345; *Frost v. Insurance Co.*, 5 Denio, 154; *May v. Insurance Co.*, 25 Wis. 292; *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Protection Co. v. Schell*, 29 Pa. St. 31; *Roth v. Insurance Co.*, 6 McLean, 324; *Insurance Co. v. McCulloch*, 21 Ohio St. 176.

Reasoning from analogy, it would seem that the declaration of the agent that the chimneys were perfectly safe would operate as an estoppel to prevent the company from denying the truth of that statement.

Finding no error in the conclusions of law reached by the court below, the case is affirmed.

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**RUSHTON, Appellant, v. BURKE, Respondent.**

**1. Parties — Taxes — Action to Recover Back.**

Where taxes have been paid to a collector under protest and with notice that an action will be brought to recover them back, it is not necessary in such case to sue the municipality for which he is collector, the action may be brought against him personally.

**2. Taxes — Recovering Back — Right of Mortgagee.**

A mortgagee has no such interest in the land as will enable him to redeem it from a void tax sale and recover back the money, although it was paid under protest.

TEMPLETON, J., dissenting.

(Argued May 17, 1889; determined October 10, 1889.)

**A** PPEAL from the district court, Cass county; Hon. W. B. McCONNELL, Judge.

*Benton, Amedon & Bradley*, for appellant.

The action was properly brought against the treasurer alone. *Elliott v. Swartwout*, 10 Pet. 137; *Faulkner v. Hunt*, 16 Cal. 167; *Meek v. McClure*, 49 id. 623; *Monson v. Johnson*, 51 id. 369; *Bank v. Chalfant*, id. 612; *Smith v. Farrelly*, 52 id. 77; *Bank v. Chalfant*, id. 170; *Bank v. Webber*, id. 73; *Iowa R. Co. v. Woodruff*, 19 N. W. Rep. 915; *Cooley, Taxation*, 805, 815.

The taxes were void. *N. P. R. R. Co. v. Traill Co.*, 115 U. S. 600.

Their invalidity did not appear on the face of the proceedings. The tax certificates issued pursuant to the sale were invalid and constituted a cloud upon the title. *Cooley*, 780. That the money paid to redeem could be recovered back, see *Cooley*, 811.

There is but a single case (*County v. Walker*, 8 Kan. 431) holding the contrary. The few cases and dicta appearing to take the opposite view will be found, on examination, to have turned upon one of the following points: 1. The taxes were paid before any attempt had been made to enforce them. 2. The taxes were void upon their face, and would, therefore, be no cloud upon the title; or 3. No protest was made at the time of payment. *Winser v. Burlington*, 27 N. W. Rep. 241; *Thomas v. Burlington*, 28 id. 480; *Erschine v. Van Arnsdale*, 15 Wall. 75; *Bruecher v. Port Chester*, 101 N. Y. 240; *Peyser v. Mayor*, 70 id. 497; *City v. Martin*, 34 Mich. 171; *Faulkner v. Hunt*, 16 Cal. 167; *Mason v. Johnson*, 51 id. 612; *Bank v. Chalfant*, id. 369; *Smith v. Farrelly*, 52 id. 77; *Stephan v. Daniels*, 27 Ohio St. 527, 544; *Seeley v. Westport*, 47 Conn. 294; *C. & N. W. R. R. Co. v. Oconto*, 50 Wis. 189.

An illegal tax may be attacked in three ways: 1. The party may apply to a court of equity to cancel it and the certificate as a cloud on his title. 2. He may apply for an injunction to restrain the levying of the tax, or the sale of the land, or the issuing of a deed. 3. In a proper case he may pay the amount demanded under protest, and recover it back.

Our statute (§ 635, C. C. Pro.) has gone far to remove the restrictions upon an action to remove a cloud, but two things are still necessary: 1. There must be a cloud upon the title. 2. The plaintiff must be the owner of either the legal or equitable title. *Stark v. Starra*, 6 Wall. 402; *Holland v. Challen*, 110 U. S. 15; *Goldsmith v. Gilland*, 22 Fed. Rep. 865, 867.

The appellant had only a mortgage lien and this transferred no title to the property. § 1706, C. C. He could not have maintained an action to cancel the tax certificate or remove it as a cloud on the title, as he had none.

For the same reason he could not have obtained an injunction. High, §§ 524, 573. In making this redemption under protest, he pursued the only remedy given him by law.

*S. B. Bartlett*, for respondent.

The taxes being void the sale was without warrant of law, had no force, and a deed thereunder would be of no validity. *William v. Corcoran*, 46 Cal. 553; *Bucknall v. Story*, id. 599; *Detroit v. Martin*, 34 Mich. 173, 22 Am. Rep. 515.

The plaintiff knew the law and the facts and he was not bound to pay. A person who voluntarily pays a void tax with a full knowledge of the facts cannot recover it back. *Powell v. Board*, 46 Wis. 213; *Babcock v. City*, 16 N. W. Rep. 627; *Phillips v. Board*, 5 Kan. 413; *Shane v. City*, 26 Minn. 543; *Williams v. Corcoran*, *supra*; *Lewis v. Hughes*, 20 Pac. Rep. 623.

The payment was not made under such compulsion as would permit a recovery. *Bucknall v. Story*, 46 Cal. 599; *Forbs v. Appleton*, 5 Cush. 115; *Boston & S. G. Co. v. City*, 4 Metc. 181, 187; *May v. Cincinnati*, 1 Ohio St. 277; *Sonoma Co. Tax Case*, 13 Fed. Rep. 789; *Fleetwood v. City*, 2 Sandf. 475; *County v. Walker*, 8 Kan. 431.

The issuance of a tax deed would in no way have imperiled the rights, or affected the interest of appellant, and he must be held to have paid the money voluntarily.

The first ground of the demurrer is well taken, as the complaint upon its face shows that all the acts done by the defendant were done as county treasurer.

AIKENS, J. This action was brought to recover the sum of \$365.82, paid by the appellant to the respondent as treasurer of Cass county to redeem certain parcels of land from sales made for the collection of taxes levied upon the same by the proper authorities of the said county for the year 1882, and for subsequent taxes paid by the purchaser at the sale. The land in question was a portion of the lands granted by the United States to the Northern Pacific Railway Company to aid in the construction of its railway, and at the time the taxes were assessed and levied no part of the cost for surveying, selecting, and conveying the lands had been paid by the railway company or its agents into the treasury of the United States.

At the time the plaintiff made the redemption he was the owner of a valid and subsisting mortgage, covering all the land redeemed; and at the time of making the payment of redemption he served upon the treasurer a written protest, setting forth specifically the facts constituting the invalidity of the taxes, and notifying him that he would at once institute suit against him to recover the amount paid as money paid by an unlawful exaction.

The lands were sold for taxes October 10, 1883; the redemption made October 13, 1885, after the purchasers at the sale were entitled to a deed, and when the same was about to be issued.

To the complaint setting forth the foregoing facts the defendant demurred on two grounds: (1) That there is a defect of parties defendant; (2) that the complaint does not state facts sufficient to constitute a cause of action. The court below sustained the demurrer, and, the plaintiff electing to stand thereon, judgment for costs was awarded the defendant. From the order sustaining the demurrer, and from the judgment entered, the plaintiff appeals to this court.

1. The contention of the defendant in support of the first ground of demurrer was, that the county of Cass should have been made the defendant, instead of Burke, its treasurer. This we consider untenable. It seems to be the well settled doctrine of law that, where an action properly lies for the recovery of money paid for illegal taxes, the agent cannot exonerate himself from personal liability by paying it to his principal after he has notice not to pay it over, or where it is paid to him under protest,

with notice that suit will be instituted to recover it. As holding this doctrine, see *Elliott v. Swartwout*, 10 Pet. 137; *Falkner v. Hunt*, 16 Cal. 167; and *Meek v. McClure*, 49 id. 623.

2. Does the complaint state facts sufficient to constitute a cause of action?

The assessment and levy of taxes upon this land was unauthorized and void. *Railroad Co. v. Traill Co.*, 115 U. S. 600, 6 Sup. Ct. Rep. 201. The plaintiff had knowledge of this fact at the time he redeemed the lands from sale, and stated the facts constituting the invalidity in his written protest and notice furnished the defendant treasurer. But he claims that such knowledge would not have the effect of making his payment voluntary, for the reason that the record of the assessment and levy, and all the proceedings regarding the sale, were regular and valid upon their face, and consequently bore the appearance of legality; and that, inasmuch as it would require extraneous evidence to establish their invalidity, sufficient existed to create a cloud upon the owner's title, and that by paying under protest the necessary amount to redeem, and thus clearing the title, an action to recover the amount paid could be maintained.

Had this action been brought by the owner in fee of the land in question, the contention of the plaintiff would be pertinent, and probably correct. But the difficulty in applying this reasoning to the case at bar arises from the fact that the owner of the fee is not in court. This plaintiff has no title, legal or equitable, to the land in question. He is simply a mortgagee. The taxes levied being void, the deed, had it issued, could not have affected his lien, nor in any degree lessened the value of his security. Should the plaintiff finally succeed to the title of the land, he could maintain a suit to remove any cloud created during his mortgagor's ownership; but until that time, until he has acquired title to the property, and becomes more than a stranger, his acts will be construed as voluntary.

It follows, therefore, that, inasmuch as the plaintiff had no interest in the property redeemed by him which could in any manner be impaired by the issuance of the deed threatened, such redemption was voluntary, notwithstanding his protest, and the demurrer to the complaint was properly sustained. The order and judgment



appealed from are affirmed. All the justices concur, except TEMPLETON, J., dissenting, and McCONNELL, J., not sitting.

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TERRITORY, Defendant in Error, v. PRATT, Plaintiff in Error.

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**1. Criminal Law — Indictment — Objections to, how Raised.**

An objection that an indictment does not show that the grand jury was impaneled, charged and sworn, or that it was not found, or presented at a term of court, cannot be raised for the first time after conviction where by statute such objections are required to be presented before plea, and an omission to do so precludes their afterward being raised.

**2. Jury — Competency of Juror.**

Where, on the examination of a juror as to his qualifications to sit in a prosecution for selling intoxicating liquors without a license, he stated he considered the sale of such liquors wrong even with a license and that a witness' being engaged in that business would affect his credibility with him (the juror), but that he would give his testimony the same consideration under all the circumstances as that of a witness in any other calling, and that its being a liquor prosecution would not influence his verdict, *held*, the trial court's denial of a challenge for actual bias ought not to be disturbed.

**3. Statutes — Construction — Intoxicating Liquors, Sale of.**

The provisions of chap. 26, Laws 1879, making unlawful the sale of intoxicating liquors without a license, remain in force in a county even though it may have adopted prohibition under the local option law, chap. 70, Laws 1887, and a party may be prosecuted under the Act of 1879, although prohibition was in force in the county at the time of the commission of the alleged offense and had been rejected when the indictment was found.

**4. Same — Trial — Instructions.**

Where a prosecution for selling intoxicating liquors rested on the testimony of the prosecuting witness, the court charged the jury that the only evidence they could consider as to the intoxicating character of the liquor was that of this witness, "who claims that he tasted it the day he bought it, and before it left his hands and control," but informed them that they had "a right to believe or disbelieve his testimony," and the matter was purely one of fact for them, *held*, there was no error committed under § 377, C. Cr. Pro., which provides that "in charging the jury the court must state to them all matters of law which it thinks necessary for their information in giving their verdict, and if it state the testimony of the case, it must, in addition, inform the jury that they are the exclusive judges of all questions of fact."

**5. Same — Appeal — Review — Sufficiency of Evidence.**

Where, on a trial for selling intoxicating liquors without a license, the prosecuting witness testified positively that he tasted the liquor, that it was whisky, and that he knew that kind of liquor from having drunk it before, *held*, the verdict was supported by evidence.

(Argued May 16, 1889; affirmed May 31; opinion filed October 10, 1889.)

**A**PPEAL from the district court, Spink county; Hon. L. W. CROFOOT, Judge.

*H. C. & T. J. Walsh, N. P. Bromley and George Cooper*, for plaintiff in error.

The repeal of a statute creating an offense sweeps away all penalties incurred for its violation during its existence. *State v. Gumber*, 37 Wis. 298, 302; *Wells v. State*, 5 S. W. Rep. 830; *Whisenhunt v. State*, 18 Tex. App. 491.

Two questions arise: Does the "Local Option Law," chap. 70, Laws of 1887, create an offense? Does the vote of 1888 act as a repeal of it in Spink county?

The statute is susceptible of two constructions: 1. That it creates, defines and provides for the punishment of a crime, that is, makes the doing of certain acts under certain circumstances criminal, and imposes penalties for the commission of these acts under those circumstances. 2. That it is a mere limitation upon the powers of the board of county commissioners, the elements of the offense being defined and the penalty for its commission being prescribed by the old law.

Prior to the passage of this law, the policy of the territory as evidenced by its various statutes, was not to suppress and prohibit, but to regulate, control and license the sale of intoxicants. *People v. Sweetser*, 1 Dak. 295.

This statute marks the initiation of a wholly variant policy. Its purpose is to prohibit the sale by local option. License after the passage of this act would constitute no defense, nor its want be of the gist of the offense. *State v. Hanley*, 25 Minn. 429.

From these considerations it would seem that the local option law does create an offense. *Territory v. O'Connor*, 5 Dak. 397, 41 N. W. Rep. 746.

What was the effect of the vote of 1888? Under a statute identical in all essential particulars with this, it has been held that the vote operates as a repeal. *Woodlief v. State*, 2 S. W. Rep. 812; *Wells v. State*, 5 id. 830; *Hafin v. State*, 5 Tex. App. 212; *Mulkey v. State*, 16 id. 53; *Dawson v. State*, 8 S. W. Rep. 820; *Whisenhunt v. State*, 18 Tex. App. 491.

The jurors, Thompson and Beckley, were incompetent, and

should have been excused. It matters not that they said they could try the case impartially. The more prejudiced a man is, as a general rule, the more positive his opinion of his impartiality.

The court, in its charge, said that the witness Parsons "claims to have tasted it (the liquor) the day he got it, and before it left his hands and control." The evidence certainly does not show any thing of the kind. An instruction which misrepresents the evidence before the jury is erroneous. *Frame v. Badger*, 79 Ill. 441; *Prairie State Co. v. Doig*, 70 id. 52; *Neil v. Paul*, 22 Cal. 494; *Burke v. Maxwell*, 87 Pa. St. 139, 153; *People v. Casey*, 3 Pac. Rep. 874.

It should appear from the indictment that it was presented at a term of court by a competent grand jury. *State v. Hogan*, 30 Wis. 433; *State v. Delue*, 2 Pin. 204; *Fitzgerald v. State*, 4 Wis. 395; *Benedict v. State*, 12 id. 313.

*Johnson Nickeus, Attorney-General*, and *R. B. Hassell*, for defendant in error.

As to the effect of the adverse vote of 1888, plaintiff relies on an ancient rule, never well founded, and which the statutes of this territory provide shall have no force. As to the nature of a local option law, that a vote does not repeal it, and that the gist of the offense is the same both before and after the vote, see *State v. Smiley*, 7 S. E. Rep. 904; *State v. Funk*, 7 N. W. Rep. 151; *State v. Circuit Court*, 1 L. R. A. 66; *State v. Wilcox*, 19 Am. Rep. 536; *Territory v. O'Conner*, 5 Dak. 397, 41 N. W. Rep. 746.

The jurors, Thompson and Beckley, were qualified to sit. §§ 7358, 7439, Comp. L.; *Thomp. & M., Juries*, 228-9; *Grisson v. State*, 2 Texas, 376; *People v. Goldenson*, 19 Pac. Rep. 161; *People v. McQuade*, 18 N. E. Rep. 156.

There was sufficient evidence that the liquor purchased was whisky.

The Code of Cr. Pro., §§ 7370, 7405, Comp. L., permits the court to state the testimony. The court did that only. There was no misrepresentation of it, and nothing said as to its weight. The instruction was an attempt to limit the jury in the consideration of the testimony, so that the rights of the defendant under the evidence might be preserved.

The defendant never moved to set aside the indictment in the lower court on the grounds complained of. He is now precluded from doing so. § 7284, Comp. L. Our Code does not require that the indictment should show that the grand jury was summoned, impaneled, sworn, etc. § 7249, Comp. L.; *Stevens v. State*, 76 Ga. 96; 5 A. C. Rep. 601.

AIKENS, J. The plaintiff in error was indicted, tried and convicted for selling intoxicating liquors without a license. The indictment recited facts leading up to the adoption in Spink county, on November 8, 1887, of what is commonly termed "the local option law," and in addition charged that the defendant, on the 22d day of October, 1888, did sell intoxicating liquor in said county in less quantities than five gallons, to-wit, one-half pint of whisky, to one Peter Parsons, without any authority or license therefor.

No motion was made by the defendant affecting the indictment, and a jury was impaneled upon a plea of not guilty.

The defendant assigns seven distinct grounds of error in support of his writ, as follows: (1) The indictment is fatally defective for reasons set forth in the motion for a new trial. (2) The court erred in overruling the challenge of plaintiff in error to Jurymen Beckley. (3) The court erred in overruling the challenge of plaintiff in error to Jurymen Thompson. (4) The court erred in admitting any further testimony after the admission made by the district attorney, at the commencement of the trial, substantially that the law alleged to have been violated was repealed by vote of the people prior to the trial and finding of the indictment. (5) The court erred in instructing the jury that the witness Parsons claims to have tasted it (the liquor) the day he bought it, and before it left his hands and control. (6) The verdict is unsupported by the evidence, in that there is no proof that the liquor sold was whisky. (7) The judgment is wrong, because the record shows that the law alleged to have been violated was repealed prior to the trial and the finding of the indictment.

The reasons referred to in the first assignment of error, as being contained in the motion for a new trial, are as follows: "The indictment is materially defective in that it is not entitled in a court having authority to receive it, but shows on its face that the

court in which it was found had no jurisdiction of the crime charged ; nor does it show that the jurors by whom it was found were ever impaneled, charged, or sworn, or that the indictment was found or presented at a term of court, general or special."

The admission made by the district attorney at the commencement of the trial, referred to in the fourth assignment of error, is to the effect that at the general election held in Spink county, in 1888, upon the submission of the question, in conformity with the provisions of the local option law, the vote was in favor of the sale of intoxicating liquor in said Spink county, and the result thereof was legally declared before the finding of the indictment in this case.

The errors assigned will be considered in their order.

1. We are at a loss to ascertain from the record or from the brief of counsel, first, what is intended by asserting that the indictment is not entitled in a court having authority to receive it. The title refers to the territory, the county, and judicial district, and gives each correctly. Section 214 of the Code of Criminal Procedure provides that "the indictment must contain the title of the action, specifying the name of the court to which the indictment was presented, and the names of the parties." Section 222 provides that "the indictment is sufficient if it can be understood therefrom that it is entitled in a court having authority to receive it, though the name of the court be not stated." The indictment was properly entitled under our Code. As to the objection that the indictment does not show that the jurors were impaneled, charged, or sworn, or that the indictment was found or presented at a term of court, general or special, it cannot be raised for the first time after conviction. The indictment should have been attacked by motion to set it aside before plea entered. Failure to do so precludes the defendant from taking the objection later. § 256, Code Crim. Proc.

2. The second and third assignments, raising substantially the same questions, will be considered together. Defendant's counsel challenge the Jurymen Beckley and Thompson for cause, claiming actual bias. The district attorney resisted the challenge, and the court overruled the same. The full examination of the jurymen is reported to aid in a clear understanding of the exceptions:

*“ Examination of Jurymen Thomson: Q. Are you opposed to the licensing and sale of intoxicating liquors? A. Yes, sir. Q. Have you any very positive conviction upon that question? A. Well, I am positive I won't vote for license. Q. You think it is wrong to sell intoxicating liquors, whether licensed or not licensed? A. Yes, sir. Q. Are your convictions very strong upon that? A. Strong enough not to vote for license. Q. Would your convictions on that question bias or prejudice your mind in any testimony in the trial of an action of this kind? A. It might, possibly, where a man sells in defiance of law. Q. Mr. Thompson, you believe that the sale of intoxicating liquors, whether licensed or unlicensed, is a moral wrong? A. Yes, sir. Q. And that any one engaged in that business is on a rather lower plane of morals than a man engaged in any other line of business? A. I would not like to say that. I say they are engaged in an immoral calling. Q. If a man engaged in that kind of business came upon the stand to testify, would you give to his testimony the same weight and credence that you would to the testimony of a man engaged in any other business, other things being equal? A. Well, I would be governed by circumstances. Q. Supposing the circumstances the same in one case as in the other, and one man engaged in the business of selling intoxicating liquors, and another man engaged in another line of business, testify directly opposite, would you give the man engaged in the sale of intoxicating liquors the same weight and credence as you would to the man engaged in the other business? A. I think it would affect me. Q. The weight that you would give to the testimony? A. Yes, sir. By the Court. Q. If a witness were upon the witness stand who had confessed that his business was that of selling intoxicating liquors, would you judge of his testimony — the credibility of his testimony — by the same facts and circumstances that you would the credibility of a witness engaged in another business; that is, without allowing the question of what business he was engaged in, weigh against his credibility? A. I think I could do that. Q. It is not a question of whether you could do it or not, but is there a prejudice against the business itself in your mind that it would probably affect the weight you would give to the testimony of the witness engaged in that business? A. Well,*

I don't carry any prejudice in my mind against those engaged in it. My opinion about the sale is that it is wrong. I don't charge my mind against any man who is selling it. I think I could give an impartial verdict. I would not allow my prejudice to swerve my judgment. Q. You don't think the prejudice you have against intoxicating liquor would extend to the persons engaged in selling it? A. No, sir. Q. So, then, the fact that they were engaged in selling intoxicating liquor would not tend to disparage their testimony in your mind? I am not speaking now of the defendant, who is charged with selling unlawfully, but any witness. Would the fact that the witness upon the stand was engaged in selling intoxicating liquor tend to disparage his testimony in your mind? A. I think not.

“*Examination of John Beckley : Question.* Would the fact, Mr. Beckley, that this is a prosecution for a violation of the law against the sale of intoxicating liquor in any manner affect your judgment? Would it in any way affect the verdict you would render, or bias your mind so that it would influence the verdict that you might desire to arrive at, — the fact that this is a prosecution for the selling of intoxicating liquors? *Answer.* No, sir. Q. Would it in any way affect the credence that you would give to the witnesses upon the stand, or weight you would give to their testimony, either on the part of the prosecution or on the part of the defense? A. I don't think it would. Q. Other things being equal, would you give the same weight, the same credence, to the testimony of a witness for the prosecution that you would to the witness for the defense? A. I think so. Q. If a witness produced for the defendant was a saloon-keeper engaged in the business of selling intoxicating liquor, would you give the same weight and credence to his testimony, other things being equal, that you would to a farmer or man engaged in any other line of business? A. As a general thing, I think I would. Of course, there are exceptions. Q. Some saloon-keepers you would believe quicker than other men? A. Yes, sir. Q. How would it be, as a general thing, would you give as ready a credence to the saloon-keeper, Mr. Beckley, as you would to a man engaged in another business, you knowing nothing at all about them except that one was a saloon-keeper and the other was not? A. I can't tell now.



*Q.* Will you swear that you would give as ready a credence to the witness upon the stand who confesses that he is a saloon-keeper that you would to a man engaged in any other business, other things being exactly equal? *A.* I would not like to, under all circumstances. *Q.* In such a circumstance as this, where a man is on trial for selling intoxicating liquor, would you then? *A.* I would believe a man if I knew he was all right otherwise. *Q.* There are two witnesses whom you have never seen before. One is engaged in the business of selling intoxicating liquor; the other, whom you have never seen before, is engaged in some other business. Would you give the same weight to the testimony of the saloon-keeper that you would to the other man? *A.* I can't tell. It would depend on what kind of testimony it was. *Q.* The testimony is exactly the same, only it is opposite. One tells one story, and the other one exactly opposite. The testimony of each, Mr. Beckley, is equally reasonable, and all other things equal, except that one man is engaged in the saloon business and the other is not. Would you give the same weight and credence to the testimony of the man who confesses that he is engaged in the saloon business as you would the other man? *A.* I don't know as I should. *Q.* You are not prepared to swear that you would? *A.* No, sir.

*Examination by District Attorney.* In a case of this kind, would you consider the circumstances, such as the demeanor of the witness upon the stand, and the way of giving evidence, and weigh his testimony just the same as you would that of any other witness engaged in any other business, and try the case according to the evidence? *A.* I think I could try it according to the evidence without any bias or prejudice.

*By the Court.* *Q.* I will ask you a question. The matter involved in this case is the selling of intoxicating liquor contrary to law. Now, two witnesses are produced who swear directly opposite, and every thing tends to show that their testimony is about equally balanced. Would the fact that one was a saloon-keeper and the other was not, — would that dip the scale in favor of the man who was not the saloon-keeper? *A.* I think, if the evidence was about alike on both sides, I would not be prepared to go on either side. *Q.* I suppose you understand, in criminal

cases, the prisoner is entitled to the benefit of the doubt. Would you give the benefit of all reasonable doubts? A. Yes, sir. Q. Could you, and would you, presume him innocent until he was proven guilty beyond a reasonable doubt? A. Yes, sir. Q. You think, then, in a case such as I have suggested to you, the mere fact of the man's business could not balance the scale one way or the other? A. Not necessarily. Q. It is whether the fact of his business will decide the question. Will the fact of this decide the question one way or the other in your mind? If there were no other facts that go to decide it, would the mere fact of his being a saloon-keeper weigh for or against the evidence? A. No, sir.

"*By Defendant's Attorney.* Q. Would you take into consideration, in weighing his evidence, as whether you believe him or not? A. No, sir; I would not. Q. Don't you think it would be a matter of conscience? A. I think so. Q. I want to inquire, Mr. Beckley, whether, on hearing his testimony and exercising your conscience in this, would you feel obliged to take into consideration the fact that he was in the saloon business? A. No, sir; I think not. Q. Would you, whether you felt obliged to or not? A. I don't think it would have any weight with me, every thing else equal."

The court below was justified from the foregoing examination in disallowing the challenges to these jurymen. In the trial of challenges for cause a large discretion is necessarily confided in the judge, and the same will not be revised on error or appeal unless it appears to have been grossly abused or exercised contrary to law. As this court has no opportunity of observing the demeanor of the jurors who are challenged, it will exercise the power of setting aside the decision of the trial judge with caution.

As to the law, it is our opinion that it has not been violated by the judge in this instance, but that his decision was correct in every particular. It is true that the jurors were both opposed, from principle, to the business of selling liquor. Both believed it to be an immoral business, whether licensed or not. This would hardly disqualify them from serving as jurors in a case of this character. They were intelligent men as disclosed by their ex-

amination. They understood clearly the rights of the accused regarding the burden of proof and the presumption of innocence surrounding him. They both say they could fairly and impartially try the case, and render a verdict unbiased and free from prejudice. The judge believed them. He had an opportunity of critically observing them when testifying, and had probably very good reasons for concluding that they were not disqualified by reason of actual bias.

It has been repeatedly held that prejudice against a particular crime, or against the actual business for which the accused is being tried, will not render the jurymen disqualified, provided he is able, for the time being, to lay aside his unfavorable opinion, and give the accused a fair trial according to the evidence. *U. S. v. Noelker*, 17 Blatchf. 554, 1 Fed. Rep. 426; *U. S. v. Borger*, 7 id. 193; *U. S. v. Duff*, 6 id. 45-48. In the famous *Anarchists' Case* (*Spies v. People*, 122 Ill. 156, 12 N. E. Rep. 865, and 17 id. 898), it was held that a prejudice against socialists, communists, and anarchists is not of itself a disqualification.

It would seem scarcely possible to be able to get a jury in a county where the local option law is in force to try a defendant under an indictment of this character if the theory of the defendant's counsel be correct. A majority of the public are law-abiding citizens, and as such they must have a natural prejudice against acts of lawlessness, and that prejudice would extend to any person engaged in the business within that county.

3. The fourth assignment of error and the seventh, being identical, will be considered together. It seems to be the theory of counsel for defendant that this "local option law" is one prescribing entirely new and distinct rules and regulations regarding the liquor tariff within the territory. Such a proposition is erroneous. The legislative intent was simply to take from the board of county commissioners the use of a discretion whenever a majority of the electors of a county should so determine at an election legally held under the provisions of such law. That discretion was to license the sale of intoxicating liquors. If a majority of the votes cast should be "against the sale," the county commissioners could not grant license to sell. If the majority was "for the sale," the county commissioners might grant license

or not, as they in their discretion might determine. The law of 1879, relating to license and the penalty for selling without, was all this time in force in Spink county. The adoption of "the local option law" in 1887 in that county did not repeal the law of 1879, so far as it prescribed penalties for selling liquor without a license; nor did the vote of November, 1888, repeal the law in force in Spink county in 1887-88. *Territory v. O'Connor*, 5 Dak. 415, 41 N. W. Rep. 746. It was at all times unlawful for any person to sell intoxicating liquor within any county in this territory without having first obtained a license as provided by law.

The indictment in this case recited "the local option law" quite explicitly, and perhaps such recitals were unnecessary, and consequently surplusage. The offense was selling liquor without a license, and it was immaterial upon that question whether or not Spink county had voted for or against the sale, or whether "local option" was in force when the indictment was presented. The penalty for selling liquor without a license remained the same through all changes regarding "local option." No vote affected it. There could be no offense against "the local option law" except on the part of a board of county commissioners, or the common council, or an officer or person presuming to have authority to grant license. § 3, chap. 70, Laws 1887.

4. The fifth assignment of error relates to alleged misconduct on the part of the court below in instructing the jury upon the evidence. The following is the portion excepted to: "The only evidence that you can consider as to whether it was whisky or not is the evidence of Peter Parsons, who claims that he tasted it the day he bought it, and before it left his hands and control."

Section 377, Code Crim. Proc.: "In charging the jury the court must state to them all matters of law which he thinks necessary for their information in giving their verdict, and, if it state the testimony of the case, it must, in addition, inform the jury that they are the exclusive judges of all questions of fact."

Although the learned judge, in his charge, did not literally follow the statute quoted, yet he did so substantially, and no less favorably to the defendant. The prosecution rested its case upon the testimony of the witness, Peter Parsons. No other testimony

was given. The judge thus charged the jury: "It is, however, purely a question of fact for the jury whether, under all the circumstances, they will believe the evidence of Parsons; and the jury have a right to believe or disbelieve his testimony, as it may seem to them worthy or unworthy of belief."

It is difficult to imagine how language could be framed that would more clearly inform the jury that they were "the exclusive judges of all questions of fact." We think there was no error in the language employed by the court.

5. The sixth assignment is surely untenable. From the record it appears that the witness, Parsons, testified positively that he tasted the liquor in the bottle he got from defendant October 23d, in Watson's shop, and that it was whisky, and he knew it, because he had drank whisky before. There was evidence, then, of the fact. The jury considered it truthful. We cannot say it is false.

This disposes of all the questions raised by the record. There being no error, the judgment of the district court is affirmed. All the justices concur, except CROFOOT, J., not sitting.

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ST. PAUL F. & M. INS. CO., Appellant, v. NEIDOCKEN, Respondent.

**Insurance — Premium Note, Liability Upon.**

Although the insured in his application, without fraud, makes such a misstatement of material facts as would, if pleaded, defeat a recovery on the policy, still, that would furnish no defense in an action on his premium note, notwithstanding § 4167, Comp. L., which provides that "a person insured is entitled to a return of the premium \* \* \* when by any default of the insured other than actual fraud, the insured never incurred any liability under the policy."

(Argued May 20, 1889; reversed May 31; opinion filed October 10, 1889.)

**A** PPEAL from the district court, Stutsman county; Hon. RODERICK ROSE, Judge.

*C. E. Joslin*, for appellant.

It is claimed respondent is entitled to a return of the premium under section 4167, Comp. L. The contract of insurance was

completed. There was a consideration for the note. The company had earned or become entitled to the benefits of the premium. Either party to the contract might do a wrong which would forfeit his right to a recovery; but there is no principle of law or equity that would permit one party to voluntarily break his contract and deprive the other of rights thereunder.

As to the claim that the failure of the respondent to state the incumbrances on the property makes the policy absolutely void, we have but to say that it is inconsistent with the contract and unsupported by reason or authority. It is voidable only at the instance of the company. It is a breach on the part of the respondent which the company may take advantage of or waive. The respondent is estopped from setting up such a breach as a defense to the payment of his note.

*S. L. Glaspell*, for respondent.

The only question is whether or not the policy was void from the beginning by reason of misrepresentations.

The court found "that the plaintiff is not entitled to recover in this case for the reason that the policy was void from the beginning."

The insurer never incurred any liability and is not entitled to any premium. § 4167, Comp. L.

The claim that the policy is voidable simply and only at the election of the insurer is not supported by authority, and is inconsistent with a provision of the policy itself. It is conceded that the insured was not guilty of fraud in making the misrepresentation; therefore, in refusing payment he is not taking advantage of his own wrong.

Aside from the statute, respondent contends that the policy was void *ab initio*, and the note sued upon was without consideration. *Waller v. Northern Ins. Co.*, 19 N. W. Rep. 865; *Conn. Mut. Life v. Pyle*, 4 N. E. Rep. 465. Where a policy is avoided by misrepresentations the policy should be canceled and premiums returned. *N. Y. Life Ins. Co. v. Fletcher*, 117 U. S. 519.

AIKENS, J. This is an action upon a promissory note given by the respondent to the appellant for the premium of a policy of

insurance. The respondent defended, alleging, among other things, that the note was given for a policy of insurance void *ab initio* by reason of material misrepresentations contained in the written application therefor, and, therefore, without consideration.

It is admitted that the representations contained in the application which were false are material, and would, if pleaded by the company, avoid any claim for loss under this policy. They relate to the ownership or title to the real estate, and incumbrance upon personal property, and are such as are usually contained in like instruments.

The respondent eliminates from the case all defenses except this one, and confidently relies upon section 4167 of the Compiled Laws (section 1543, Civil Code) as sustaining his theory. The learned judge in the court below found with the respondent upon this proposition, and gave judgment for him.

The section above cited reads as follows: "A person insured is entitled to a return of the premium when the contract is voidable on account of the fraud or misrepresentation of the insurer, or on account of facts of the existence of which the insured was ignorant, without his fault, or when, by any default of the insured other than actual fraud, the insurer never incurred any liability under the policy." The court below found, as a conclusion of fact, that there was no misrepresentation intentionally made on the part of the defendant as to the incumbrance on the personal property, and also that the fact of the title being in the government was known to the plaintiff.

As to the latter finding, we do not consider that there was any misrepresentation. The question and answer as to title was as follows: "(7) What title has the applicant to these premises? Homestead." In a well-considered case in New York (*Merrill v. Insurance Co.*, 73 N. Y. 452) the court held that where a like question was answered, "deed," it did not amount to a representation that the applicant had the absolute title in fee to the premises. We think the same rule would apply to this case; and certainly so where the court below found that the plaintiff knew, at the time the insurance was effected, of the real condition of the title.

As to the representation concerning incumbrance upon the per-



sonal property, it might, as a defense, if pleaded in an action to recover for a loss under the policy, avoid liability; but it is equally true that, in the absence of such a defense, the policy-holder would be entitled to recover. The policy is voidable only at the option of the insurer. The conditions contained in the policy regarding representations and warranties contained in the application are solely intended for the benefit of the insurer, and, like any other benefit or advantage, may be disregarded or waived. One of the early and best-considered cases upon the subject of waiver by insurance companies of such conditions or warranties is *Viele v. Insurance Co.*, 26 Ia. 9.

Respondent contends, in his brief, that the following clause in the policy rendered it absolutely void to such an extent that it ceased to have a legal existence, viz.: "If the assured shall make any false or erroneous representations or concealment material to the risk, \* \* \* then, and in every such case, this policy shall be null and void." Justice BECK, speaking for the court, in *Viele v. Insurance Co.*, *supra*, at page 51, says: "Unsound conclusions in the argument of defendant's counsel result from an improper understanding of the expression, 'shall be void,' used in the condition above quoted from the policy. It is insisted that the instrument, by force of these words, upon the increase of the risk, became absolutely null and void. The phrases and words used to convey the idea are, '*ipso facto* void,' 'dead;' 'extinct;' 'defunct;' 'of no effect,' etc. — meaning thereby that the instrument has no force or effect, in the sense of these terms, when applied to instruments void in law; as the deeds of parties having no legal capacity to contract, or contracts against public policy, etc. But the term 'void,' as used in the policy, has no such meaning. It simply means that the underwriters, upon the violation of his covenants by the assured, shall cease to be bound by their covenants in the policy; and this is in accordance with the true definition of the word, and its common use in like connections. The policy does not cease to have a legal existence. It is the only competent evidence of the contract it embodies; and, in truth, is not void, except so far that the underwriters are no longer bound thereby. Neither will they be discharged therefrom unless they plead the fact that the insured failed to perform his covenants

contained in the policy. Their silence would waive the default of the opposite party." Again, on page 52: "The party in default cannot defeat the contract." The party for whose benefit the conditions are introduced may waive the forfeiture. It follows, therefore, that the instrument is forfeited at the option of the innocent party; and, if he waives the forfeiture, the contract stands as if no breach had occurred."

The views held by the Iowa supreme court are supported by a long list of highly respectable authorities cited in the able opinion from which the foregoing quotations are borrowed.

Again, in this case the record is silent as to any rescission or attempt at rescission, on the part of the defendant; and, as it is in its nature an affirmative plea in avoidance, it must be presumed that there was none. The policy contained this condition, which is reasonable, viz.: "(4) This company may at any time cancel this policy, returning the unexpired premium *pro rata*. The assured may at any time have this policy canceled by paying all premiums due therefor, at customary short rates, for the time the policy has been issued." Surely the defendant would have no right to avoid the payment of earned premium upon such a plea, never having demanded a return of the premium, or offered to return the policy.

It is the opinion of the court that the court below erred in rendering judgment for the defendant, and the same is reversed, and a new trial ordered. All the justices concur, except Rose, J., not sitting.

## APPENDIX.

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BODE, Respondent, v. NEW ENGLAND INVESTMENT CO. ET AL.,  
Appellants.

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1n	128
42*	658
45*	200

THIS case was argued at the February Term, 1889, and affirmed at the May Term, 1889, when an opinion was filed. A rehearing was granted at the October Term, 1889, and after the case had been reheard by the supreme court of North Dakota, which on the admission succeeded this court in this case, the judgment appealed from was reversed. It is not deemed advisable, under the circumstances, to report the proceedings of this court. The opinion on affirmance will be found in the 42 N. W. Rep. 658; that on the reversal in the 45 id. 197.

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KEEHL, Appellant, v. SCHALLER, Respondent.

### Appeal — Erroneous Dismissal.

Where an undertaking on appeal from a justice of the peace is defective in not containing one of the conditions required by law, it is error to dismiss the appeal where the appellant offers to remedy it as to the defect of which complaint is made.

(Argued and determined at the May Term, 1886.)

APPEAL from the district court, Beadle county; Hon. SEWARD SMITH, Judge.

This was an appeal from an order of the district court dismissing an appeal from a judgment of a justice of the peace on the ground that the undertaking was defective. The original action was to recover possession of personal property. On an appeal in such a case, where a stay of proceedings is desired, the undertaking, among other things, must be conditioned that the appellant "will obey any order made by the court." § 93, Jus-

tice Code. This condition having been omitted from the undertaking, the respondent moved to dismiss the appeal. At the time the motion was heard the appellant asked leave to amend his undertaking to comply with the requirements of the statute. This was denied and the motion to dismiss sustained. This section of the statute also provided that "an appeal from a justice's court is not effectual for any purpose, unless an undertaking be filed, with two or more sureties, in the sum of \$100, for the payment of the costs on the appeal; or, if a stay of proceedings be claimed, \* \* \* when the action is for the recovery of specific personal property the undertaking must be conditioned that the appellant will pay the judgment and costs appealed from, and obey the order of the court made therein, if the appeal be withdrawn or dismissed, or any judgment and costs that may be recovered against him in said action in the district court, and will obey any order made by the court therein."

*N. D. Walling*, for appellant.

This omission in the undertaking was not material. *Marvin v. Marvin*, 11 Abb. Pr. 97; *Beach v. Southworth*, 6 Barb. 173; *Billings v. Roadhouse*, 5 Cal. 71.

If the undertaking were defective, that was no ground for dismissing the appeal, the appellant should have been allowed to amend. *Marvin v. Marvin*, *supra*; *Beach v. Southworth*, *supra*; *People v. Tarbell*, 17 How. Pr. 120; *Billings v. Roadhouse*, *supra*; *Howard v. Harmon*, 5 Cal. 78; *Coulter v. Stark*, 7 id. 244; *Cunningham v. Hopkins*, 8 id. 34; *Frankel v. Stern*, 44 id. 168; 2 Wait Pr. 782, 790.

*H. C. Hinkley*, for respondent.

This being an action in claim and delivery, the omitted condition was the most important of all, and was a defect that could not be remedied by amendment. *Eastman v. Barnes*, 1 New Eng. Rep. 347; *Wells, Replevin*, §§ 392, 398, 419, 483.

This was a statutory requirement; without it the appeal was ineffectual. Justice Code, § 93; *Hardwick v. Duchaine*, 32 Wis. 155; *Langley v. Warner*, 1 N. Y. 606.

The sureties were liable for express conditions only. *Wells*,

§§ 429, 430; *Young v. Mason*, 3 Gilm. 37; *Mitchum v. Stanton*, 49 Cal. 304.

Courts allow amendments only when the terms of the undertaking are not enlarged. *Wells*, § 429; *Wheeler & W. M. Co. v. Brown*, 25 N. W. Rep. 427; *Cliney v. Portland*, 24 Cal. 147.

By the COURT:

The order dismissing the appeal in this case is reversed. All the justices concur.

**TERRITORY OF DAKOTA, ON THE INFORMATION OF L. B. FRENCH,  
DISTRICT ATTORNEY, Plaintiff, v. COX ET AL., Defendants.**

**1. Constitutional Law — Executive Power — Office and Officer — Removal.**

The power of removal from office is not judicial in the sense that it cannot be exercised by the executive, either with or without notice to the incumbent proceeded against.

**2. Same.**

Under the public examiners act, chap. 124, L. 1887, §§ 3, 4; Comp. L., §§ 119, 120, authorizing the examiner to "make an exhaustive examination of the books and accounts" of the public "institutions" of the territory, and "report to the governor the result of his examination," and providing that "the governor may cause the results of such examinations to be published, or, at his discretion, to take such action for the public security as the exigency demand," *held*, the governor, upon the receipt of an examination, had the power to remove from office the trustees (managing officers) of the public institution examined.

**3. Same — Filling Vacancies.**

Sec. 8, chap. 22, Pol. C., § 1392, authorizing the governor to fill "all vacancies" in territorial offices, is not in conflict with § 1858, R. S. U. S., which authorizes the governor of any territory to fill a vacancy in such office when it "happens from resignation or death," and the governor may, under the territorial statute, fill a vacancy occasioned by removal.

**I**N the district court, second judicial district, Yankton county, Dakota Territory.

*French & Smith and Gamble Bros.*, for plaintiff.

*Chas. F. Templeton, Attorney-General*, and *R. B. Tripp*, for defendants.

TRIPP, C. J. This is an action in the nature of *quo warranto*,

brought on the information of the district attorney of Yankton county, to oust the defendants, Robert Cox, Miles T. Woolley, W. Y. Quigley and F. A. Gale, from the office of trustees of the insane asylum located at Yankton, Dakota.

The defendants answer separately, and the plaintiff demurs to the answers of the defendants Cox and Woolley, which raises the questions of law presented to the court for determination. From the complaint and answers of the defendants Cox and Woolley, which, for the purpose of this hearing, are admitted to be true, it appears that B. S. Williams, William M. Powers, Frank L. Van Tassel, Martin J. Lewis and Charles H. Brown were, during the last session of the legislature of Dakota, appointed trustees of said asylum by the governor; that they were duly confirmed by the council, and that they qualified and entered upon the discharge of their duties on or about March 25, 1887. That subsequently and on or about September 30, 1888, said Lewis and Brown resigned, and the defendants Gale and Quigley were appointed by the governor to fill the vacancies occasioned by their resignation; that on or about the 30th of September, 1887, while an examination was pending before the public examiner of the district comprising said asylum, the governor suspended said Williams, Powers and Van Tassel from further performance of their duties as trustees, and that thereafter on the 2d day of November, 1887, upon the conclusion of such examination, he removed them from office, and appointed in the place of said Williams and Powers, the defendants Cox and Woolley. The demurrers to the answers of Cox and Woolley present substantially the same questions of fact in each case, and involve the same questions of law for the determination of the court. The questions of law raised by the demurrers may be divided into two propositions:

1. That there was no power in the governor to remove the trustees Williams, Powers and Van Tassel.

2. That if he had power to remove them, he had no power to appoint the defendants Cox and Woolley without the advice and consent of the council. The first proposition, to-wit: That the governor had no power to remove these trustees, the plaintiff bases upon two grounds:

1. That under our organic law the power of removal is judicial

and not executive, and that the legislature could not authorize the governor to exercise such power.

2. That the legislature has not authorized the exercise of such power, and that its acts do not admit of such construction.

I will consider these propositions in the order presented, though I may be unable to follow counsel over the entire field of inquiry entered upon by them in the learned discussion at the bar. The subject of constitutional law is a fruitful and tempting one when once entered upon in legal discussion or judicial inquiry. I shall content myself, however, with stating results which I deem pertinent to the determination of the question before me, and which I think are arrived at by the decisions of the highest courts of our country.

Is then the power of removal under our organic law judicial or executive? The school boy early learns that the government of our country is divided into three great departments — the executive, the legislative, and the judicial: and that each department is sovereign and independent of the other, but during his whole life, aided by the works of the best elementary writers and the decisions of the highest courts, he will be in frequent doubt as to which department some of the more commonly exercised powers of the government properly belong. And we are more in doubt from lack of precedent in the past. Our country was in many respects a new creation. It is even more unlike the republics it is supposed to have imitated than the monarchies it is presumed to have opposed. So it will be found that while in theory our government, in many of its fundamental theories, is exactly the opposite of the mother government, yet it will be found upon comparison that notwithstanding the extreme republican views of the framers of the constitution, and the bitter enmity existing against England and her people, we have not only copied into our jurisprudence the great body of her common law, but we have so framed our organic laws in consonance with the unwritten constitution of that government, that we are obliged continually to be governed by her political precedents and her judicial decisions. It is true that we have denied the divine right of kings, and that with us all ultimate sovereignty is in the people; yet when that sovereignty, whether derived from the people or the king, in the



foundation of government, state or nation becomes lodged in the executive, legislative or judicial department, its exercise is the same in either case, except so far as by grants and limitations of our written constitutions we have taken from one and added to the other of sovereign power. In England we have witnessed the entire executive and legislative exchange of sovereign power and the transition from absolute monarchy, when the bold barons of England wrested from King John the immortal magna charta, to the omnipotent parliament under Charles I, when the legislative overrode and absorbed all the judicial and the executive powers, and broke down the barriers which had guarded the royal prerogatives from the time of the Norman conquest.

The parliament of England still continues sovereign. Blackstone, in his time, gives the definition of sovereignty as follows: "By the sovereign power is meant the making of law, for wherever that power resides all others must conform to and be directed by it, whatever appearance the outward form and administration of the government may put on. For it is at any time in the option of the legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases, by constituting one, or few, or many executive magistrates; and all the other powers of the state must obey the legislative power in the discharge of their several functions, or else the constitution is at an end." 1 Black. Com. 49.

In the creation of our government we have sought to distribute the sovereign power, to take from the legislative department, the judicial and executive, and to give to each of them sovereign powers separate and independent of each other, so that each may be a check, but without power to encroach upon the other. The theory is simple; the application of the theory is often difficult. Neither congress nor the legislature of a state can take from or confer upon either department, any power or functions not belonging to such department, except so far as it may be permitted so to do by the terms of the constitution itself. Hence, when the legislature has undertaken to confer upon the judiciary duties of a political or administrative character, such acts have been declared unconstitutional and void, as when under the congressional act of 1792, power was attempted to be conferred upon the courts

to determine what soldiers should be placed upon the pension list; the act was declared unconstitutional and void, in that the determination of who were, and who were not entitled to pensions, belonged to the administrative or executive department of the government. *Marbury v. Madison*, 1 Cranch, 171. And again, when it was sought to impose upon the courts the duty of determining the claims of the inhabitants of Florida for the injuries sustained on account of the American army, the courts held it was a matter not belonging to the judicial department, and that the legislation was unconstitutional and void. *U. S. v. Ferreira*, 13 How. 40. And in a recent case in Kansas, reported 1 Pac. Rep. 272, an appeal was undertaken to the district court from the decision of the board of county commissioners in setting off and organizing new townships under an act conferring such power upon them. Appeals were allowed in Kansas as in this territory, "from all decisions of the county commissioners." The Kansas court held that the term "all decisions" must be limited to decisions judicial, or *quasi* judicial, that such power of appeal could not be construed to include appeals from decisions of an executive or administrative character. And it is equally true that where judicial power has been sought to be conferred upon any officer of the executive department, such legislation, when not permitted by the express terms of the constitution, has been held null and void. In accordance with this well known principle, our supreme court in *Spencer v. Sully County*, 33 N. W. Rep. 97, held that the legislature could not confer upon the board of county commissioners the power to hear and determine claims of a judicial character against the county so as to bind the parties; that the judicial power of this territory was lodged in the courts expressly named in the organic act, and that while the board could audit accounts, and appeals might be taken from their decisions, yet their decisions were not so far judgments as to prevent claimants from suing upon their original causes of action. These are but illustrations of the rule that no power exists in the legislature to take from one department of the government and to bestow upon the others. The rule is plain in its terms, but to determine in each particular case what is judicial, legislative or executive "*hic labor hoc opus est.*"

What I have so far said applies to the government of the United States and to the government of the several states under their written constitutions. And this, although the constitutions of the states and the constitution of the United States are to be examined and construed from standpoints exactly opposite. The constitution of the United States is a grant of power, while the constitutions of the states are limitations of power. The state legislature has all power of legislation except so far as it is limited by the constitution; the congress has such powers of legislation as are expressly and by necessary implication conferred by the terms of the constitution. *Cooley, Const. Lim.* 207; *Still v. Village*, 15 N. Y. 297; *People v. Galligard*, 4 Mich. 244. Each is sovereign in its way, the one in the powers impliedly granted and not prohibited by the terms of the constitution, the other in the powers expressly granted and not impliedly prohibited by the terms of the grant; the former like all acts of limitation being strictly, and the latter like all grants of power being liberally construed. The national government has sovereign power over all the territories. *Am. Ins. Co. v. Canter*, 1 Pet. 511; *Nat. Bank v. Yankton Co.*, 101 U. S. 132; *Territory v. Scott*, 3 Dak. 357. This power has never been denied, although courts have differed as to the particular section of the constitution which gives the power. It is sufficient for this discussion that the recognized power exists. Congress in the exercise of this power early created local self-governments out of its "outlying territory," denominated territorial governments, a name not found in the constitution itself, and it gave to these governments the usual executive, legislative and judicial powers. The organic acts of the several territories from the earliest history of the country have been of the same general character. They are framed after and founded upon the constitution of the United States itself, and are singularly like the early state constitutions, and the division into, and the separation of, the three great departments and the grants of powers thereto are much the same also, in character and distribution. The intention of congress to form a government is in terms expressed in the first section of our organic act, where, after giving the boundaries of the proposed territory, it concludes with the words "is organized into a temporary government by the name of the Territory of Dakota." It

has sometimes been said the territory is an "embryo state," and while the congress has never surrendered its right of supervision over the legislation of the territory, yet such power of congress has been very rarely exercised in the territories, and never perhaps in the history of this territory except upon direct application of her citizens to supply some omissions, or to relieve from some inadvertence of territorial legislation during the recess of the territorial assembly. The legislative grant to the territorial legislature is equal to, and, in some respects, greater than that allowed to many of the state legislatures, it extends "to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States," subject to the very few limitations enumerated in the grant, the grant of power to the executive and judicial departments is equally broad and comprehensive, so that in organizing the "temporary government," congress intended such government to have and exercise all the attributes of sovereignty "temporarily," subject only to such supervision as the congress shall choose from time to time to exercise over it. With this residuum of power remaining in congress, dormant except when expressly exercised, the government of the territory is sovereign in each department and its organic law is to be construed as its constitution, either in the light of a grant or a limitation of power, perhaps as to some portions it is to have the former, and as to others it is to have the latter construction. In *Hornbuckle v. Toombs*, 18 Wall. 655, Judge BRADLEY in speaking of territorial governments says: "As a general thing, subject to the general theme of local government chalked out by the organic act, and such special provisions as are contained therein, the local legislature has been intrusted with the enactment of the entire system of municipal law, subject also, however, to the right of congress to revise, alter, and revoke at its discretion. The powers thus exercised by the territorial legislature are nearly as extensive as those exercised by any state legislature." And in *Clinton v. Englebrecht*, Chief Justice WARRE, upon the same subject, says: "The theory upon which the various governments for portions of the territory of the United States have been organized, has ever been that of leaving to the inhabitants all the power of self-government consistent with the supremacy and supervision of the national authority, and with certain

fundamental principles established by congress." 13 Wall. 341. Our district courts have in fact held the territorial governments sovereign, and have denied to suitors the right of action against the territory. Judge SHANNON so held after an elaborate argument at the bar in the action of *Harris v. Territory of Dakota*, in which the plaintiff brought suit for fees as codifier of the laws, and as far as I am aware such has been the view of the courts generally. If the territorial government is so far sovereign that its organic act is subject to the same rules of construction as the constitutions of the state and the national governments, let us proceed to inquire in the light of the construction given by the courts of the several states under constitutional powers similar to our own whether the power of removal, claimed by the executive, was a judicial or an executive, one, and I may premise by saying that the powers and jurisdictions of the great departments of the government so often overlap, and like the colors of the rainbow so interblend that the line of separation is often indiscernible even by the judicial eye. *Cooley*, Const. Lim. 106; *Fletcher v. Peck*, 6 Cr. 136. Yet if the power be clearly judicial, it cannot, as already shown, be conferred upon the executive, and any exercise of such power by him would be a usurpation and his action illegal and void. What then is judicial power? It is said to be "the power to hear and determine," but this definition is too comprehensive; every administrative and executive officer is required to hear and determine many facts upon which his action is based. All the political and executive departments of the government are required to pass upon controverted questions of fact, boards of canvassers, boards of equalization, boards of county commissioners, and other administrative officers are continually passing upon questions of the greatest moment to the citizen, involving the right of office, the disbursement of the public revenue in the erection of bridges and public buildings, and the opening of highways in fixing the values of property and in levying and collecting of taxes, often involving civil rights and sometimes, where the administration of the government is concerned, rights of persons and property; and while the determination of such questions involves judgment and discretion and the examination of difficult and controverted questions of fact, and while the decision of such admin-

istrative officer upon such hearings is final, yet his action is not judicial. In the case of *State v. Hawkins*, lately determined in the supreme court of Ohio, where the governor of that state had removed the police commissioners of Cincinnati, and it was urged that his action was illegal and void upon the ground that the power of removal was judicial and could not be conferred upon the executive, that court in an able review of the American authorities upon this question, holding that the power of removal is executive and not judicial, says: "The first claim is upon the assumed ground that the power conferred upon the governor by the statute to remove any of them for official misconduct is judicial in its nature, and, though conferred by the act, cannot be exercised as the judicial power of the state is, by section 1, art. 4, of the constitution conferred upon the courts of the state only. This is not to be regarded as an entirely new question. It has been much discussed by courts and writers without being able to formulate any general rule upon the subject. What is judicial power cannot be brought within ring fence of a definition. It is, undoubtedly, power to hear and determine; but this is not peculiar to the judicial office. Many of the acts of the administrative and executive officers involve the exercise of the same power. Boards for the equalization of taxes, of public works, of county commissioners, township trustees, judges of election, viewers of roads, all in one form or another, hear and determine questions in the exercise of their functions more or less directly affecting private as well as public rights. It may be safely conceded that power to hear and determine rights of property and of person between private parties is judicial, and can only be conferred on the courts. *Merill v. Sherburne*, 1 N. H. 199. But such a definition does not necessarily include this case. The incumbent of an office has not, under our system of government, any property in it. His right to exercise it is not based upon any contract or grant. It is conferred on him as a public trust, to be exercised for the benefit of the public." 5 N. E. Rep. 232. Such action by administrative or executive officers is not judicial in the sense that it belongs exclusively to the courts. It may be so far judicial that such an officer so exercising judgment and discretion in the determination of controverted ques-



tions of fact, may be protected in an erroneous determination of the matter before him, but not so far judicial that the subject-matter is cognizable by the courts only. All judicial power by the organic act, like the constitutions of the states and of the nation, is vested in the courts; a prohibition upon its exercise by the executive or legislative department, but the judicial power therein conferred upon and limited to the courts, is that judicial power which in the legal acceptation of the words can be exercised only by the court. It is the power which is confined to the courts by the words of limitation in the constitution itself, "that no person shall be deprived of life, liberty, or property, without due process of law." Art. 5, Amend. to the Const. In other words, the courts have exclusive power to hear and determine those matters which affect the life or liberty or the property of the citizen; all other rights, while they may be in a sense judicial, are not so far within the jurisdiction of the courts that their exercise by another department would be void. Is the right in controversy of that character? Does it affect the life, the liberty or the property of the citizen? Judged by this test, it is not a judicial power. It is a power often conferred upon the courts, and its exercise is highly judicial in its character; it often involves close and contested questions of fact, and nice and delicate discrimination in the application of law, but it is the subject-matter and not the procedure that determines jurisdiction. I have examined the cases with much care which have been collected and presented to me with commendable zeal and industry, and an examination of the cases here cited, without an attempt at review, discloses two distinct lines of authority, holding opposite and contradictory views upon this question we are discussing; though many of the cases may be distinguished as being based upon the peculiar phraseology of the provisions of the constitution construed. The authorities holding that removal from office is a judicial power and can be exercised only by the courts are based upon the theory that an office is in the nature of a property right, and that the citizen can be deprived of it only by "due process of law," while the other line of decisions holds that under our form of government, there is no property in an office, that offices and officers are for the benefit of the people, and not for the benefit of the officers, and that whenever



the officer fails to perform the duties of the office, the office becomes forfeited, and that the only object of the examination necessary to determine such forfeiture is such as will establish the fact not to the satisfaction of, or for the benefit of, the incumbent, but to the satisfaction of the executive department which is charged with the execution of the laws, and that hence the removal may be summary, or upon such investigation as may be prescribed by the legislative department. The principal cases which hold the view that removal from office is a judicial and not an executive power are: *Dullam v. Willson*, 53 Mich. 392; *Bowman v. Silfer*, 25 Pa. St. 28; *Page v. Hardin*, 8 B. Mon. 672; *State v. Pritchard*, 36 N. J. L. 101. While among those maintaining the contrary doctrine may be cited: *People v. Whitlock*, 92 N. Y. 191; *People v. Stout*, 11 Abb. Pr. 17, 35 Barb. 254; *State v. Doherty*, 13 Am. Rep. (La.) 131; *Wilcox v. People*, 90 Ill. 186; *People v. Mays*, 7 N. E. Rep. 660; *Donahue v. County*, 100 Ill. 94; *State v. Hawkins*, 5 N. E. Rep. (Ohio) 228; *Houseman v. Commonwealth*, 100 Pa. St. 220; *State v. Oleson*, 18 N. W. Rep. (Neb.) 45; *South v. Commonwealth*, 5 S. W. Rep. 567; *Smith v. Brown*, 59 Cal. 672; *People v. Hill*, 7 id. 97; *Attorney-General v. Brown*, 1 Wis. 513; *State v. McGarry*, 21 id. 496; *State v. Prince*, 45 id. 610; *Carland v. Board*, 6 Pac. Rep. 24; *Taft v. Adams*, 3 Gray, 136; *Ex parte Wiley*, 54 Ala. 226; *Keenan v. Perry*, 24 Tex. 253; *State v. Frazier*, 48 Ga. 137; *Dugan v. District (Col.)*, 22 Am. Law Reg. 528; *Patton v. Voughan*, 39 Ark. 211.

The court in *State v. Hawkins*, *supra*, reviewing the decisions which hold that the power to remove officers is judicial, says they "have, as a rule, proceeded upon the ground that an incumbent has property in his office, and that he cannot be deprived of his right without the judgment of a court. This view finds support in the doctrines of the common law, which regarded an office as a hereditament, but has no foundation whatever in a representative government like our own." And the court in *Donahue v. Co. of Will*, *supra*, says: "It is impossible to perceive how, under our form of government, a person can own or have title to a governmental office. Offices are created for the administration of public affairs. When a person is inducted into an office, he thereby be-

comes empowered to exercise its powers and perform its duties, not for his, but for the public benefit. It would be a misnomer and a perversion of terms to say that an incumbent owned an office, or had any title to it."

Some of the best jurists of our country have held that trials of impeachment are not an exercise of judicial powers, where the punishment extends only to removal from office, but are an exercise of the executive or administrative functions of the government, that belong to the political rather than to the legislative or judicial departments. Such was the view taken by no less distinguished lawyers than Senators Sumner, Fessenden, Buckalaw and Garrett Davis, upon the impeachment of Andrew Johnson. (See Opinions, Cong. Globe.)

Without stopping to notice further the learned arguments and reasonings of the courts, I am content to say that in my judgment, those decisions which hold the power of removal to be executive in its nature, are more in harmony with our age and our form of government. The right of removal always existed unquestioned in the king even after the encroachments of parliament; and while in adopting the common law of England we did not adopt the form of government to which it applied, yet in defining the words, "judicial, legislative and executive," which are found in our written and common law, we may safely have recourse to the source from which they are derived to aid us in determining their present meaning. And if the officer may be removed by the executive, he may be removed either with or without notice and hearing, as the legislature have chosen to provide or as the terms of the constitution may require. Our organic law is silent upon this subject, and it follows that if power of removal in this case is given to the governor, with no notice or hearing provided, he would be at liberty to remove summarily upon the occurrence of such an event, as may be prescribed by statute.

Secondly—It is further urged by the plaintiff that the act under which the executive claimed to remove these trustees does not confer such authority in terms nor by fair implication. The act is found in the laws of 1887, chap. 124, relating to public examiners. The act is somewhat lengthy and need not be given in full. Sections 1 and 2 provide for the division of the territory

into two examiner districts, and for the appointment by the governor, with the advice and consent of the council, of the public examiner in each district, and for his removal by the governor, for violation of duty. Sections 3 and 4 are as follows:

Section 3. "It shall be the duty of said public examiners authorized and empowered by this act, in their discretion to assume and exercise a constant supervision over the books and financial accounts of the several public, educational, charitable, penal and reformatory institutions belonging to the territory, and within said examiner's district. Each examiner shall prescribe and enforce correct methods of keeping financial accounts of said institutions, by himself or duly appointed deputy, and instruct the proper officers thereof in the due performance of their duties concerning the same. It shall be the examiner's duty to visit each of the said territorial institutions within his district, by himself or duly appointed deputy, at irregular periods, without previous notice to the officers thereof, at least twice each year, and make an exhaustive examination of the books and accounts thereof, including a thorough inspection of the purpose and detailed items of expenditure, and the vouchers therefor."

Section 4. "It shall be the duty of the said examiners to order and enforce a correct and as far as practicable, uniform system of book-keeping, by territorial and county treasurers and auditors so as to afford a suitable check upon their mutual action, and insure the thorough supervision and safety of the territorial and county funds. They shall have full authority to expose false and erroneous systems of accounting, and when necessary, instruct, or cause to be instructed, territorial and county officers in the proper mode of keeping the same. It shall be their duty to ascertain the character and financial standing of all present and proposed bondsmen of territorial and county officers within their districts. Each examiner shall require of county treasurers within his district, from time to time, as often as he shall deem necessary, a verified statement of their accounts, and he shall personally or by duly appointed deputy, visit said office, without previous notice to such treasurers, at irregular periods of at least once a year, or when requested by any board of county commissioners, and make a thorough examination of the books, accounts and vouchers of such officers,

ascertaining in detail the various items of receipts and expenditures; and it shall be his duty to inspect and verify the character and amount of any and all assets and securities held by said officers in public account, and to ascertain the character and amount of any commissions, percentages, or charges for services exacted by such officers without warrant of law. Each examiner shall report to the attorney-general the refusal or neglect of county officers to obey his instructions, and it shall be the duty of the said attorney-general to promptly take action to enforce compliance therewith. The said examiner shall report to the governor the result of his examination, which shall be filed in the executive office, as well as any failure of duty by financial officers, as often as he thinks required by public interests, and the governor may cause the results of such examinations to be published, or, at his discretion, to take such action for the public security as the exigency may demand; and, if he should deem the public interests to require, he may suspend any such officer from further performance of duty until an examination be had, or such security obtained as may be demanded for the prompt protection of the public funds."

Section 5 provides for the examination of banking and other private moneyed corporations; and the remaining sections of the act provide the procedure and means of obtaining testimony at the examinations and prescribes penalties for disobedience, etc.

The act itself is unique and establishes a complete system of supervision over the public institutions of the territory, and of its financial agents. Sections 3 and 4 above quoted contain all the powers of the examiners, except the last section of the act, which provides that it shall be the duty of the attorney-general to assist the examiners when called upon by them to do so. The portion of the act relied upon by the executive as providing for removal is at the close of section 4, and is contained in the words: "And the governor may cause the results of such examination to be published, or, at his discretion, to take such action for the public security as the exigency may demand."

The plaintiff contends: 1. That these words apply only to section 4 and not to section 3. 2. That the words do not give any power of removal to the governor. In the construction of statutes the entire act will be taken together, and such meaning will be

given to it as from the entire context it is evident the legislature intended it to have. In looking at section 3 it will be observed that the examiner is given "a constant supervision over the books and financial accounts" of this asylum, and "at least twice a year he is required to make an exhaustive examination of the books and accounts thereof, including a thorough inspection of the purposes and detailed items of expenditure and the vouchers thereof." Here the section closes; no provision is made as to what is to be done with the results of such examination, but in section 4, after detailing the examiner's powers over the territorial and county auditors and treasurers, it is provided without any limitation of the words to the examination of the last officers named, that "the examiner shall report the result of his examination to the governor, which shall be filed in the executive office," and that thereupon the governor may proceed as above quoted. Why is it required that the examination made should be filed with the governor in the case of the treasurers and auditors, and not in the case of the territorial public institutions? The examinations provided for are as rigid in case of the public institutions, and the examiner is given greater powers, since he is permitted to inquire into the "purpose" of the items of expenditure, reaching to not only the system of book-keeping and the honesty of the superintendent and steward as financial agents, but the entire management of the institution; while in case of auditors and treasurers he is only required to examine into the honesty of their official transactions, and the correctness of their accounts as auditors or treasurers and not into the fiscal affairs of the counties or territory. The examiner is also required to make an examination of the territorial institutions at least twice a year, while in case of auditors and treasurers he is not required to make an examination but once a year. If there is any importance at all to be attached to the filing of such examinations with the governor, and making reports to him it would seem to obtain with as much force in favor of the examination of the public institutions as that of the treasurers and auditors. The people are as much and as directly interested in the proper conduct and management of the territorial institutions, and that the public funds should be as safely and honestly accounted for by them, as by the auditors and treasurers

of the various counties of the territory. But there are other words of this section which throw light upon its construction. The provision including the words already given, reads: "The said examiner shall report to the governor the result of his examination, which shall be filed in the executive office, as well as any failure of duty by financial officers, as often as he thinks required by public interests." What is meant by the words, "as well as any failure of duty by financial officers as often as he thinks required by public interests?" Why are the words "financial officers" used if the examinations required to be filed were the examinations of financial officers only? In other words, if the term "financial officers" shall be held to include auditors, treasurers and such officers as have especial charge of finance proper, as I am inclined to think it should, and the examinations required to be filed with the governor were the examinations of such officers, as is contended for by plaintiff, would it not have been the natural statement of the section, after providing for the filing of such examination, to have continued "as well as any failure of duty by such officers?" or in other words, why repeat "financial officers," if those of whom he had last been speaking were financial officers only? It is plain to my mind that the clause as to filing examinations with the governor was intended to apply both to the examination of the public institutions, and to an examination of the auditors and treasurers. It is no unusual thing in legislation to make a provision refer to more than one independent preceding clause. If the two sections had been one, the construction would have been comparatively easy, but sections as well as punctuation marks are often the work of an engrossing clerk and sometimes of the printer; and courts do not heed the latter, and will so arrange the former as to give the intended meaning. Our supreme court in *Brown Co. v. Aberdeen*, determined at the October Term, 1886, took the proviso away from the second section, to which it was appended, and appended it to the first section of the act, it being plain from the context that it was intended to modify the first and not the second section. It requires a far less transposition here where it is evident that the clause is intended to modify both preceding sections. And what has been said as to filing such examination with the governor applies with its full

force to the action of the governor upon such examination. He may, upon the filing of such examination, "cause the results to be published, or, at his discretion, take such action for the public security, as the exigency may demand." It follows that if the examination to be filed with him, is both the examination of the territorial institutions and of the auditors and treasurers, that he may exercise such power as is here given upon the persons whose examination is so filed with him. What power is he permitted to exercise by these words? It is evidently intended to confer upon the executive discretion; it expressly says so, and the discretion is unlimited by the words which follow; but he is "at his discretion to take such action as the exigency demands." He is made sole judge of the exigency, and what action he will take; what power was intended by these words to allow the executive to exercise? There must be a limit somewhere; it could not have been intended to authorize him to fine or imprison these recusant officers; such attempted exercise of judicial power would not only be a violation of fundamental law, but would shock the layman's view of justice and of right. These words must, however, have some meaning if it is possible for the courts to give them such construction. Dwarria, Statutes; Domat's Rules. The plaintiff says they mean that the governor is given a choice of remedies provided by the statute for the punishment and removal of offenders. This would be giving to the words a redundant force, for the executive as well as any other citizen may set the machinery of the courts in motion for the punishment of any offender; but upon examination of the statutes I am unable to find any provision by which the governor may take any step for the removal from office, or for the punishment of such offenders. By chap. 1, title 3 of the C. Cr. Proc., it is provided that the grand jury may present an accusation in writing against territorial, county and municipal officers for misconduct in office, and issues may be formed by answer of the defendant to such accusation, and tried to a jury of the county where such officer resides; and upon conviction, judgment of removal may be entered, but the grand jury have the control of initiating such a proceeding; the governor has no more power over such a proceeding than a private citizen; and the same is true of any other criminal or civil pros-



execution of such officer for default or misconduct in office. Our statutes are entirely silent as to any power conferred upon the governor that any private citizen does not possess. The words must then be regarded as redundant, and as not conferring upon or not authorizing the governor to exercise any power, unless the court can give them some other force and meaning. It was evidently the intention of the legislature to authorize the governor to exercise all such power as it was competent for him to exercise under any legislation which it had power to enact. If it did not authorize him to exercise the power of removal, it conferred upon him no power, for there is no other executive or administrative power it could authorize him to exercise. It could not confer upon him any power of punishment, for any power which went beyond the office itself, and pertained to the incumbent himself, would be judicial and incapable of exercise by the executive; but the legislature could confer upon or rather it could permit the governor to exercise any administrative or executive power. I say permit him to exercise, for properly speaking the legislature could confer no power; the only power given our legislature is legislative power, which can never be delegated. Cooley, Const. Lim. 207. Nor can the legislature confer upon the executive, legislative or administrative power; such power must have existed in him by virtue of the organic act itself as one of those dormant powers requiring the act of the legislature to bring it into action, and to regulate and control its use. That this power of removal is an executive one, and that it may properly be left with the governor or other executive officer of the territory, I have no doubt; but whether it was the intention of the legislature to authorize, and whether it has authorized the use of such power by the executive, I have some doubt. I am disposed, however, to give the words the natural meaning they would have in the light of the accompanying legislation, and the object sought to be attained by such enactment. That these words could have no other meaning than removal, we have already seen. Did the legislature intend to give these words such meaning? It must be presumed that they were intended to have some meaning and that they were not intended by the legislature to be rejected as redundant; and in replying to argument of counsel that the legislature could never

have intended to place such power in the hands of the executive, it is sufficient to say that the examination of the statutes of the different states will reveal the fact that in almost all, such a provision will be found either in their constitution or statutes; and in Minnesota, the state from which this statute was taken, almost in *haec verba* there is an express statute permitting the governor, not only to remove the financial officers of a county, but the county commissioners and other administrative officers. But a better and stronger evidence of the intention of the legislature exists in the amendment of this act itself and other concurrent acts of the same session. By chap. 125, two days after the passage of this examiners act, the legislature passed an amendatory act giving the governor absolute power of removal of the examiners themselves, whenever "they fail to faithfully discharge the duties of their office," and an examination of the legislation of that entire session, so far as I have been able to make it, reveals the fact that every office created by it to be filled by appointment of the governor, it has provided also for removal therefrom by the governor. It is provided in the new school law that he may remove the superintendent and both assistants. § 1691, Comp. Laws.

He may remove the commissioner of immigration. § 110, Comp. Laws. He may remove the veterinary surgeon. § 2333, Comp. Laws. He may remove all the military officers. § 1922, Comp. Laws. The court is not only permitted, in giving construction to statutes, to look at all other statutes of the same legislature to see what of such powers it had also otherwise granted, but it may trace the history of the act and inquire of its construction by the tribunals that have put it into execution. I am informed by those presumed to be familiar with the workings of this statute in Minnesota, where it had been in force since 1878, that the executive of that state has construed it to have the same force and effect as claimed for it by the executive of this territory, and that unchallenged by parties interested, for it does not seem to have been brought before the courts for their construction. The concluding words of section 4 should not be overlooked however; it is there provided that the governor, pending an examination, may suspend the officer from duty; it is contended by the plaintiff that these words represent the maximum of the governor's

power; that he may exercise any power given by the statute even to the extent of suspending the offending officer, but I cannot agree with this construction. The suspension is an intermediate not a final act; it is given to prevent a failure of administration or loss of the benefits to be derived from removal, by allowing a dishonest officer, after notice of an examination pending, to hold possession of the office and make way with the public funds, or cover up his corrupt misconduct. And under such interpretation, the absurdity of the provision for suspension in its final result, is apparent; the provision for suspension is pending the examination; he can only be suspended "until an examination be had or security be given." It is not until an examination can be had in the courts; not until his case can be presented to a grand jury; but until the examination is had by the examiner; then, when an examination is had, when it is completed and filed, *eo instanti*, under the construction of the plaintiff that the governor cannot remove, he must, no matter however guilty the examination proves him, be reinstated in office. The construction leads to the absurd conclusion that the governor is authorized to suspend upon suspicion, but cannot remove upon a case proved. I am constrained after much study and with some hesitation to adopt the construction that the legislature intended to authorize the governor to exercise all and every of his executive power in enforcing this examiners act. The whole act is meaningless and a farce without such construction; an idle examination, the result of which cannot even be used as evidence in a court of justice, and no method even for its preservation under the construction contended for by the plaintiff. I have nothing to do with the propriety or impropriety of the act itself, whether it is a wise or an unwise law; that was a matter for the legislature, and if in its construction by the courts it is found unwise, a future legislature can repeal it. It has been wisely said that "the best way to get rid of a bad law is to enforce it." In any event it is not the duty of the courts to make or revise legislation; they are kept sufficiently employed to give construction and meaning to laws already made. Under this view the governor would have and exercise all and every executive power conferred upon him under the organic law, to the same extent as if the legislature had expressly

enumerated all his powers, and then said he might in the execution of this law have and exercise any or all of said enumerated powers. Clearly the executive can get no powers from the legislature, and its enumeration of such powers could not confer them. Then why, when the legislature has given him the discretion of exercising his executive powers, has he not the same power to remove as he would have if the legislature had enumerated that power in the providing for the execution of the law? There is no difference in effect between the governor's exercising the power of removal under the discretion conferred by the statute, and his exercising the power of removal under the statute conferring it specifically. And the only difference is in the comprehensiveness of the terms of the statute and not in its results.

Again it is the duty of the court to give this statute, which is one addressed to the executive department, the same construction it has received from the officer executing it, if it can be done without violence to the language of the act. The judicial department, like the other department, while it has jurisdiction to supervise and pass upon their acts so far as they are in violation of the organic law, yet it is the duty of the court in case of doubt as to the constitutionality of legislation, or violating of fundamental law by executive construction, to give the benefit of such doubt in favor of the construction adopted by the department itself.

In reference to treaty stipulations and matters belonging to the political department of the government, it is the settled rule of the courts to follow the decisions of the executive and the political branches of the government, whose more especial duty it is to determine such affairs. *U. S. v. Holliday*, 3 Wall. 419; *U. S. v. Regnes*, 9 How. 154; *Foster v. Nielson*, 2 Pet. 253; *Garcia v. Lee*, 12 Pet. 511; *Luther v. Borden*, 7 How. 35; *State v. Stanton*, 6 Wall. 50; *State v. Johns*, 4 id. 475; *Worcester v. State*, 6 Pet. 560. Our own supreme court adopts this rule in *Uhlig v. Garrison*, 2 Dak. 96, where it follows the construction of the Indian treaty of 1868, given to it by the executive departments at Washington. It is only where there is a plain and clear misconstruction of the terms and meaning of the act by the executive departments that the courts will interfere; and while there exists

some doubt as to the force and effect to be given to the language of the act before me, I do not think the doubt is of the character that calls upon me to reverse the action of the executive and to give a contrary construction to it from that which it has received from the co-ordinate branch of the government first called upon to construe its meaning. In passing it might be well to say that I do not feel called upon to pass upon the question urged at the argument as to whether the governor has power without statute to remove territorial officers appointed by him. I do not consider it necessary to review the decisions of congress and the courts by which that principle has finally obtained in favor of the executive of the nation under the constitution, nor to review the conflicting decisions of the state courts to trace the analogy between the national and the state governments in which the principle has been both affirmed and denied. I content myself with the result. I have announced that by the weight of judicial authority in our country the power of removal is essentially executive and not judicial, and that however far it may be controlled by legislative action in determining the agent by whom and the manner in which it shall be exercised, it is sufficient for the determination of this case that the legislature has spoken, and by its words the governor was authorized to make the removals complained of.

Third. I now come to the last proposition of the three, and one upon which much stress was laid at the argument, to-wit: That though the governor have power of removal he has no power of filling vacancies occasioned by such removal, except by and with the consent of the council. The plaintiff contends that the organic act has pointed out the way in which appointments are to be made and what vacancies can be filled by the governor alone; and it having stated the manner of appointment and enumerated the cases in which the governor alone can fill vacancies, such statements and enumerations are exclusive and the legislature can prescribe no others. This as a general proposition is true of constitutional legislation; that where the constitution has spoken, such utterances are exclusive; and that upon a given subject-matter, the expression of one thing is the exclusion of all others, and this rule has been adhered to very rigorously by our supreme court. See *Territory v. Briggs*, 1 Dak. 302; *Harris M. Co. v. Walsh*, 2

id. 41. And perhaps even the border line was crossed in the latter case ; but I think I shall be able to distinguish the case at bar without violations of the established rule. Sections 1857 and 1858 of the United States Revised Statutes upon which plaintiff relies, read as follows :

Section 1857. "All township, district, and county officers, excepting justices of the peace and general officers of the militia, shall be appointed or elected in such manner as may be provided by the governor and legislative assembly of each territory ; and all other officers not herein otherwise provided for, the governor shall nominate, and by and with the advice and consent of the legislative council of each territory, shall appoint ; but, in the first instance, where a new territory is hereafter created by congress, the governor alone may appoint all the officers referred to in this and the preceding section and assign them to their respective townships, districts, and counties ; and the officers so appointed shall hold their offices until the end of the first session of the legislative assembly."

Section 1858. "In any of the territories, whenever a vacancy happens from resignation or death, during the recess of the legislative council, in any office which, under the organic act of any territory, is to be filled by appointment of the governor, by and with the advice and the consent of the council, the governor shall fill such vacancy by granting a commission, which shall expire at the end of the next session of the legislative council."

Section 1857, it will be observed, prescribes for the filling of all township, districts and county offices by election or appointment and for the filling of all territorial offices by appointment of the governor with the advice and consent of the council, with one exception, in which the governor, in the first instance, may alone appoint, and under section 1858 the congress has given to the territories the right to fill vacancies during the recess of the council in two cases only, to-wit, the death or resignation of the incumbent. Plaintiff contends that these two sections are grants of power to the governor to appoint, and that the only power he has, or can exercise, as to appointments was given him by these sections. Section 1857 was enacted in 1861 (so far as this territory was concerned), and that under it the governor could only appoint by and with the

consent of the council, and that after the enactment of section 1858, in 1872, he could by that grant of power fill vacancies in the two cases therein specified only. If the premises of the plaintiff are correct that these two sections are to be construed as grants of power, and that they contain all the power of appointment that the executive of this territory has, or can exercise, the result contended for would seem to follow; but under the view I have taken, the powers of appointment and removal are executive powers conferred upon the governor by the organic act vesting in him the executive powers of the territorial government subject to legislative control as to time and manner of exercise, etc. It is too well settled to need citation of authority that all matters of appointment and removal, except so far as legislation has been had in the constitution itself, is a proper subject of legislation by the legislative department of the government, but how far the legislature may go in controlling the action of the executive by legislative enactment is by no means clear; the omnipotent power of our own legislative bodies so often asserts itself that courts hesitate often in drawing the boundary line of their power. Says Chief Justice MARSHALL in *Fletcher v. Peck*, 6 Cranch, 136: "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power in cases where the constitution is silent never has been and perhaps never can be definitely stated." It is sufficient for our present purpose that it is conceded that the field so far as it is clear of constitutional or organic legislation is open to state and territorial legislation. Our legislature is vested with power of legislation as we have seen more ample than most state legislatures; that power is extended to "all rightful subjects of legislation not inconsistent with the constitution and the laws of the United States." § 1851, U. S. R. S. That this is a rightful subject of legislation is conceded. It remains only to ascertain whether it be in conflict with the constitution or any law of the United States; to be "inconsistent with any law means inconsistent with any law then or thereafter existing in a subsequent section of the same or of a subsequent act; in other words, the organic act gave to the



legislature full power to legislate upon all rightful subjects of legislation except as congress in the same act or existing acts had or thereafter by subsequent acts, should limit such legislative power. Under such interpretation, which seems to me to be the only reasonable one, section 1857 contained in the organic act of 1861, must be construed as a limitation upon the legislative power contained in section 1851 and upon the executive power contained in section 1841 of that same act, and not as a grant of power, and should, therefore, receive a strict rather than a liberal construction. As a limitation of power, was it intended that the governor should in all cases make appointments only with the advice and consent of the council? The same organic act of 1861 limited the session of the council to forty days, and it must have been presumed to know what has been several times held by the departments and the courts, that the session of the council was at an end at the expiration of that time, that it was extinct, and could not be re-assembled by order of the executive or otherwise; and is it to be presumed that congress intended by giving the executive power to appoint by and with the advice and consent of the council, to prohibit the legislature from providing for vacancies occurring after the session of the council had ended? Is it not more reasonable to hold that the section was intended to apply to appointments made for the full term during the session of the legislative assembly, and would a legislative enactment providing for such vacancies be inconsistent with it? Our legislature enacted as early as 1877 a law giving the governor the power of filling all vacancies occurring in the territorial offices. Such statute has remained upon our statute books unchallenged to the present time (§ 1392, Compiled Laws), and it is safe to say that some such statute will be found in the legislative enactment of every territory. The length of time that it has remained upon our statute books gives it an implied sanction of congress. Says the supreme court of the United States in *Clinton v. Englbrecht*, 13 Wall. 434: "In the first place we observe that the law has received implied sanction of congress. It was adopted in 1859. It has been upon the statute book for more than twelve years. It must have been transmitted to congress soon after it was enacted, for it was the duty of the secretary of the territory to transmit to

that body copies of all laws, on or before the first of the next December in each year. The simple disapproval of congress at any time would have annulled it. It was no unreasonable inference, therefore, that it was approved by that body." It would in my judgment be a very strict construction of this section to hold that congress intended to leave this and other territories with no power of filling vacancies during the recess of the legislative council; that no matter how soon after the adjournment of the legislature or in how many of the territorial offices the vacancies occurred, there was intended to be no power of filling such offices until the next legislature should meet, and that nearly two years might elapse with an entire suspension of some or all of the executive functions of that department, unless aid could be had through the tardy action of congress itself. Upon a hasty examination of the decisions of the states where similar provisions of the constitution obtain, I am strengthened in the view I have taken of this question. In New York, under their constitution it was provided that "Sheriffs and clerks of courts shall be designated by the electors of the respective counties once in every three years, and as often as vacancies shall happen." (Art 4, § 8.) The legislature enacted a law providing for filling vacancies by the governor to hold until the next general election, when the vacancies should be filled by election, and this same question was there raised to the court, that the constitution had spoken and the legislature must be silent; that the constitution itself having provided for filling vacancies, that method was exclusive; but the supreme court of New York denying the proposition and sustaining the validity of the law, speaking through Judge BRONSON, says: "But I feel no great difficulty in saying that the law is valid. There must of necessity be an interval between the death, resignation or removal of the incumbent and the filling of the vacancy by the electors; and it is essential to the public welfare that some person should in the meantime discharge the duties of the office. The legislature has provided that the vacancy shall be supplied by the people at the next general election after it happens (1 R. S. 123, § 8) and that in the meantime the duties of the office shall be discharged either by the deputy or by a person appointed by the governor, or by both of them. This space in which the office may

not be filled by election can never exceed one year, and may sometimes amount only to a few days. How long it may happen to be, provided it does not extend beyond the next annual election, is a question, I think, fairly within the discretion of the legislature. The language of the constitution is not, that the office shall be filled by election in every possible case, nor that a vacancy shall be supplied in that manner as soon as it happens; but the language is, that vacancies shall be supplied by election as often as they happen; that end is fairly attained by referring the matter to the people at the next stated period for exercising the elective franchise." *People v. Fisher*, 24 Wend. 219. The same question came before the court of appeals in *People v. Snedeker*, 14 N. Y. 52, in which Judge DENIO, delivering the opinion of the court and quoting the above language of Judge BRONSON and affirming the doctrine of that case, says: "This view is so reasonable as to command the assent of every person." The same question arose in Wisconsin where the constitution makes provision for the election of sheriffs, and no provision is made for the appointment by the governor in any case. The case seems to have been one of first impression, and the court without reference to New York, or other decisions, arrives at the same conclusion and gives the same reason and uses language similar to that of Judge BRONSON. "Moreover, we are clearly of the opinion that the statute which authorizes the governor to appoint some suitable person to perform the duties of sheriff for the time being, when there is no officer duly authorized to perform the same, is a valid law, notwithstanding the constitution, art. 101, § 4, provides that the sheriff shall be chosen by electors, and fails to confer the power of appointment on the governor in any case. It would be too strict a construction of the constitution that in cases where it is silent the legislature has no power to provide against the entire suspension of the functions of any public office, when the office has become vacant, and there is no officer authorized by law to perform these functions. Such a construction would be intolerable; and we cannot believe that it was contemplated by the convention which formed, or the people who adopted the constitution." *Sprague v. Brown*, 40 Wis. 612. In Minnesota, § 1, art. 11, their constitution declares that "provision shall be made by law for the election of

such county or township officers as may be necessary." The courts say: "Under this section it is claimed that county offices can be filled only by election, and that the appointment of county officers, under any circumstance, is forbidden. This construction would prevent a vacancy from being filled by appointment for a length of time which would necessarily intervene between the occurrence of the vacancy and the first succeeding general election, or even an especial election; certainly this would work great public as well as private inconvenience and injury, and in our judgment the constitution framed as it was for practical purposes, need not, and should not receive a construction so narrow, and the fact that many provisions of our statutes, in reference to filling vacant offices by appointment have been framed in accordance with this view of the constitution, and have been acted upon for years, is entitled to great weight as legislative and practical construction." *State v. Benedict*, 15 Minn. 158. See also 17 Pa. St. 118; 21 Iowa, 540; 18 Wall. 317; 1 Pet. 511. These decisions to my mind are based upon correct reasoning and are decisive of the question we are now considering. The legislature of the territory in providing for filling vacancies is not legislating in conflict with section 1857. The test is in this case as in all others, is the legislation inconsistent with the congressional enactment; if it is not, it is valid; if it is, it is invalid. Giving to section 1857 the construction that it was intended to apply to appointments made for the full term during the session of the legislature, and not to vacancies occurring during the recess, the legislation of the territory supplements it, and supplies an omission that might otherwise cause great inconvenience and injury. But it is urged that section 1858 has enumerated the cases in which the vacancies can be filled and it must be conclusive. The same arguments apply to this section as we have already applied to 1857, but it is further to be noted in reference to this section, that it was not enacted until 1872, more than ten years after our sovereign existence had begun. It was enacted by congress by virtue of its reserved power to legislate direct for the territories. *National Bank v. Yankton*, 101 U. S. 455. It contains no express repeal of existing enactments, and cannot be construed as repealing existing laws, or as prohibiting further legislation except as they may be

in conflict therewith. This enactment has a history. In 1872 the supreme court of Montana held (*Territory v. Potts*, 1 Mon. 252), that, under the organic act and her statute as it then existed, which provided in express terms for filling vacancies by the governor with the advice and consent of the council, the governor alone could not fill vacancies, and a death of one of the territorial officers having occurred during a recess of the council, the delegate from Montana got this act through congress, general in its character as such acts usually are, for the special benefit of Montana. The act was in aid, not in restraint of legislation; that congress had power to pass the act is not denied; that it was intended to limit legislation in the sense that no other legislation could be had by the territorial legislature upon the subject of vacancies, is denied. The section must be construed as a limitation only upon the general power of the legislature in that it takes away from the legislature the power to fill vacancies in the two cases mentioned in any other way than by appointment of the governor. Congress by its enactment in this as in other cases has given in the organic acts all the sovereign power necessary to make independent governments. These acts of creation or organic laws, are constitutions that give all the powers that congress has to give them, and subsequent acts are not as a rule grants of power but legislation to correct legislation of the territory or to supply some omission of territorial legislation, and in that light such congressional acts may be supplemented and filled out like existing acts of the legislature itself, subject only to the restriction that no part of the congressional enactment can be changed or impaired and the supplement or amendment must not be inconsistent therewith. Guided by this rule the legislative enactment for filling vacancies is supplementary of section 1858 and is not inconsistent with it; it simply adds other cases of vacancy to those of 1858 which may be filled by the governor. I am aware of a different view taken by the court of New Mexico in *Territory v. Stokes*, where two persons, both claimed to be attorney-general, and insisted upon representing the people. The authorities do not appear to have been reviewed or examined with much care, and the decision seems to have been received with so little favor at home, and was regarded as of such doubtful authority

that the governor several years thereafter during the recess of the council, removed the attorney-general and appointed another in his place and the supreme court declining to pass upon the legality of the appointment because a proper case was not before them, takes occasion to say of that case "that decision stands as the declared law, and we are bound to respect it until overruled or modified in a regular proceeding," language generally used by courts to intimate a doubt of the correctness of the ruling, and an intimation that the court would at least be willing to review its former decision. *In Re Attorney-General*, 9 Pac. Rep. 249, and later, the same judges in *Territory v. Ashenfelter*, 12 Pac. Rep. 879, refer to this statute allowing the governor to appoint and fill vacancies during the recess of the council, for other causes than death or resignation, and consider it as in full force, giving it construction as applied to the case under consideration. I do not care to discuss the peculiar complications that existed in that territory, and which may to some extent have influenced the decisions of her courts. It is sufficient to say that I prefer to adopt the rule announced by the learned courts of New York, Wisconsin and Minnesota as more in accordance with congressional license and the exigencies of territorial legislation. This same question has recently come before the supreme court of Utah, and the court arrived at a conclusion exactly opposite to that arrived at by the New Mexico court. The governor appointed an auditor during the recess of the council, in place of such officer claimed to have been elected by the people, and the case was presented by the ablest attorneys at the bar, and the court upon the question as to the governor's right to appoint without the advice and consent of the council, in cases other than death and resignation says: "There being a vacancy in the office I think there can be no doubt but that the governor was authorized to fill the same by appointment. It is provided by § 8, act of 1852 that, 'vacancies may be filled by executive appointment in the foregoing or any office when the mode of supplying vacancies is not prescribed by law. Nothing can be plainer than the foregoing, and the act of the governor in making the appointment was clearly within his power, and strictly within his duties. If he had omitted to make the appointment he would have failed to have done his duty; he simply

did that which the law required him to do." *People v. Clayton*, 11 Pac. Rep. 211.

Upon a careful review of all the authorities presented upon the argument of this case and all those which I have examined since its submission, I am of the opinion that the demurrer should be overruled. Let the order be entered accordingly.





# INDEX.

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## ABATEMENT AND REVIVAL.

### **Replevin, Survival of.**

Under § 85, C. C. Pro., providing that "No action shall abate by the death \* \* \* of a party, \* \* \* if the cause of action survive," and authorizing the court to "allow the action to be continued by or against his personal representative or successor in interest," the court in an action of replevin, where the defendant pleaded title and right of possession to the property, allowed the action upon the defendant's death to be continued by his personal representative. *Held*, proper. *O'Neil v. Murry*, 107.

## ACTION.

### **Damages — Fraudulent Act — Liability.**

1. In order to maintain an action for a fraudulent act it is not only necessary to prove damages but it must appear that they were the necessary result of the act and such as can be clearly ascertained. *County v. Northcote*, 378.

2. Where by statute it was made the duty of the county treasurer to settle with the commissioners at stated periods, and the defendants, knowing the treasurer was a defaulter, and with the intention of concealing it and defrauding the county, loaned him funds to effect his settlement, and the commissioners being deceived, audited his accounts, continued him in office, and he afterward embezzled further funds of the county and fled the territory, *held*, the defendant sustained no liability to the county. *Id.*

## AGENCY.

*See Principal and Agent.*

## APPEAL.

Right of, see *Banks and Banking*, 1; effect, see *Justices of the Peace*, 2; extent of review, see *Poor Debtors and Statutes*, 6.

### **Appellate Jurisdiction. Rehearing, Jurisdiction to Grant.**

1. Where the *remittitur* has been sent to and filed in the court from which the appeal was taken, without fraud or mistake, the supreme court has no jurisdiction to grant a rehearing. *Wallace v. Stutsman County*, 1.

### **Appealable Judgment.**

2. A judgment *pro forma*, that the complaint be dismissed and that the defendants have and recover their costs and disbursements, the costs and disbursements not having been entered, is final within the meaning of § 10, chap. 54, L. 1885, giving a right of appeal from "any final judgment" in contested election cases. *Adams v. Smith*, 94.

### **Reversal — Directing Final Judgment.**

3. Under § 25, chap. 20, L. 1887, providing that "upon an appeal from a judgment \* \* \* the supreme court may reverse, affirm or modify the judgment," *held*, the court, where it had reversed a judgment sustaining a demurrer to a complaint in a contested election case, the election being had under an invalid law, could direct the final judgment to be entered in the case. *Id.*

**Requisites and Practice — Notice — Sufficiency.**

4. By § 89, Justices' Code, as amended, Laws 1881, chap. 4, § 1, p. 5, with reference to the contents of a notice of appeal, it is provided, it "must state whether the appeal is taken from the whole or a part of the judgment; and if from a part, what part, and whether the appeal is taken on questions of law or fact, or both." Section 91, as amended, Laws 1879, chap. 81, § 2, p. 100, provides that, "when a party appeals to the district court on questions of fact, or on questions of both law and fact, and demands in his notice of appeal a new trial in the district court, no statement (on appeal) need be made, but the action must be tried anew in that court." *Held*, that where the appeal was upon questions of both law and fact, there need be no demand for a new trial in the notice in order to give the district court jurisdiction to determine the questions apparent of record, and passed upon by the justice. *Karr v. C. & N. W. Ry. Co.*, 14.

**Justice Peace.**

5. By § 2, sub. 2, Justices' Code, the jurisdiction of justices of the peace extends "to an action \* \* \* where the sum claimed does not exceed one hundred dollars." By § 23, a defendant's answer may contain a "counter-claim upon which an action might be brought by the defendant against the plaintiff in a justice's court." The plaintiff sued for \$80; the answer of the defendant contained an admission of plaintiff's demand, and a counter-claim for \$135, with a prayer for judgment for the difference, \$55. The justice having sustained a demurrer to the counter-claim, entered judgment for the plaintiff, and the defendant appealed without any statement. The district court dismissed the appeal on the grounds that the justice had no jurisdiction of the counter-claim, and the appeal had been taken on questions of law and fact. *Held*, error. Section 89, as amended, L. 1881, chap. 4, § 1, Comp. L., § 6129, provides that "any party dissatisfied with a judgment rendered in a justice's court may appeal therefrom to the district court," \* \* \* and the notice of appeal must state whether the appeal "is taken on questions of law or fact, or both." Section 90, as amended, L. 1879, chap. 81, § 1, Comp. L., § 6130, provides that a party appealing on questions of law alone, must have a statement of the case settled by the justice. *Purcell v. Booth*, 17.

**Dismissal — Bond — Justification, Sureties.**

6. Under section 93, Justices' Code, providing, "An appeal from a justice's court is not effectual for any purpose, unless an undertaking be filed with two or more sureties. \* \* \* The adverse party may except to the sufficiency of the sureties \* \* \* and unless they or other sureties justify, \* \* \* upon notice to the adverse party, \* \* \* the appeal must be regarded as if no such undertaking had been given," the respondent excepted to the sureties and they justified on an oral notice to one of respondent's attorneys. No appearance was made by respondent at the justification, and in the district court he moved to dismiss the appeal on the ground that the sureties had not justified in the "manner and form as required by law." At the hearing of the motion appellant offered to have the sureties justify if it was claimed the undertaking was not sufficient security. The court dismissed the appeal. *Held*, the court had acquired jurisdiction of the case and it was error to dismiss the appeal. *Judson v. Bulen*, 70.

7. Where an undertaking on appeal from a justice of the peace is defective in not containing one of the conditions required by law, it is error to dismiss the appeal where the appellant offers to remedy it as to the defect of which complaint is made. *Keehl v. Schaller*, 499.

**Record — Bill of Exceptions.**

8. Where it is sought to review the trial of an issue of fact and no exceptions are brought into the judgment roll by a bill of exceptions, case, or otherwise, the court will not examine the questions presented on a record agreed to by the parties, but will affirm the judgment from which the appeal is taken. *Raymond v. Spicer*, 45.

**Review — Insufficiency of Evidence.**

9. Under § 279, C. C. Pro., requiring a party who objects to a decision on

the ground of the insufficiency of the evidence to sustain it, to specify the particulars wherein it is insufficient, and there was nothing in the record pointing out wherein it was claimed the evidence was insufficient, the court cannot examine the evidence. *Henry v. Dean*, 78.

#### **Harmless Error.**

10. Where a witness is not permitted to answer a proper question, but at another time is allowed to answer it in effect, there is no reversible error. *Territory v. Collins*, 234.

#### **Objection Waived.**

11. Where the prosecuting attorney in his closing address to the jury, stated a fact not in evidence, prejudicial to the defendant, but the record only showed an objection and exception to it ; *held*, it was not saved so as to be reviewed by the appellate court. *Id.*

#### **Findings.**

12. Where there is no substantial conflict in the evidence and the findings are against the weight of the evidence, an appellate court will reverse a judgment founded on such findings. *Buttz v. Colton*, 306.

#### **Specific Performance.**

13. In an action for specific performance the plaintiff obtained a decree on the contract, modified, as he contended ; but the contract, however, was that the defendant, in consideration of the plaintiff's undertaking to have the county in which the land was situated organized, the county seat placed near the land and a certain railroad constructed there, agreed to convey to him sixty acres in a certain quarter section less such amount as he should find necessary to give the railroad company to induce it to come, and (after the county had been organized and the county seat located as contemplated) the plaintiff contending that the company had agreed to come for forty acres, and that the original contract had been modified by parol so that he was to have the balance of the sixty acres in another quarter section, and that there had been a part performance of the contract as modified, but the evidence on these issues showing merely the expression of opinion by the agent of the company that he thought the road could be induced to come for forty acres, and it appearing the defendant had obligated himself to the company to convey to it sixty acres to induce it to come, and that he had not been released from that obligation, and it also appearing that the alleged part performance could as well be referred to the defendant's obligation to the company as to the alleged modified contract, *held*, the decree should be reversed and that the contract itself was not of a character to appeal strongly to a court of equity for enforcement. *PALMER, J.*, dissenting. *Id.*

#### **Part Performance.**

14. An act in part performance must be with reference to the particular contract sought to be enforced. *Id.*

#### **Damages, Remoteness of.**

15. Where it was sought to reverse a judgment on the ground that the damages were remote, but the evidence was such that the court would not have been authorized in directing the verdict, and there was no exception to the action of the court in charging the jury on this point, *held*, the matter was not saved so that it could be reviewed by the appellate court. *Pielke v. Chicago, M. & St. P. Ry. Co.*, 444.

### **ASSIGNMENT FOR BENEFIT OF CREDITORS.**

#### **What Constitutes — Chattel Mortgages.**

1. Where an insolvent firm gave some of its creditors mortgages on its entire stock in trade, all of the mortgages being executed within a few minutes of each other and their amount far in excess of the value of the goods, and permitted the mortgagors to take immediate possession of the property, *held*, that the transaction constituted an assignment whereby it was sought to prefer

creditors and was prohibited by § 2027, C. C., which provides that an insolvent may make an assignment for the benefit of his creditors, "provided \* \* \* that such assignment shall not be valid if it be upon, or contain any trust or condition by which any creditor is to receive a preference or priority over any other creditor; but in such case the property of the insolvent becomes a trust fund to be administered in equity." *Straw v. Jenks*, 414.

### **Rights of Creditors.**

2. While the execution of the mortgages in such case constituted an invalid assignment, still, their having been given to secure *bona fide* debts, there was no such a fraudulent disposition of the firm's property as would authorize the other creditors to attach it. The mortgages operated to divest the firm of its title, and the mortgagees held it in trust under the statute for the benefit of all of the creditors. *Id.*

3. Where an insolvent makes a general disposition of all of his property and abandons his business, or puts himself in such a position it is impossible to continue the business, he has made a voluntary assignment within the meaning of the statute, and it matters not the character of the instrument or instruments used to effect the object. The purpose of the statute is to prevent preferences, and it should receive such a construction as will effect that object. *Id.*

## **ATTACHMENT.**

Liability on bond, see *Set-off and Counter-claim*.

### **Liens — Priority.**

E. attached certain property and the debtor claimed it as exempt; the officer, however, held the property under the writ. During this time W. attached it on a debt against which it would not be exempt. After this, the debtor waived his exemptions on E.'s attachment; *held*, E. had the superior lien. *Wallace v. Swan*, 220.

## **ATTORNEY AND CLIENT.**

### **Communications.**

Under sub. 1, § 499, C. C. Pro., providing that "an attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment," an attorney employed for the purpose of drawing certain conveyances (the execution of which had been determined upon before consulting him) may testify as to what was said and done at the time of their execution as bearing on an issue of their being absolute, or conditional merely. *O'Neil v. Murry*, 107.

## **BANKS AND BANKING.**

### **National Banks — Receivers — Parties.**

1. A receiver, under the national bank act, is entitled to be substituted as sole defendant in actions pending against the bank at the time of his appointment. *Sioux F. N. B'k v. First N. B'k*, 113.

### **Appeal, Right of.**

2. A national bank, after the appointment of a receiver, has no authority to appeal from an order refusing to dissolve an attachment made before the receiver's appointment. *Id.*

### **National Banks — Powers — Cashier's Check — Liability.**

3. Where a national bank issued its cashier's check to a county treasurer in order that he might effect a settlement of his accounts with the board of county commissioners, *held* (the board having no notice of any defense to the check), that on the settlement the check immediately became the property of the county, that the bank could assert no want of power to issue the same, nor the existence of any fact that might be a defense between itself and the treasurer. *Held, also*, that the transferee of the check would succeed to the

rights of the county and in an action on the check, would, as a matter of law, be entitled to a verdict against the bank. *Id.*

#### **Deposits—Ownership — Parties.**

4. Where a bank receives money from a party and opens an account with him in his name, it is bound to honor his checks to the extent of his deposit. It will not be permitted to show title in another not a party and making no claim to the fund. So, one depositing money as "agent," subject to his checks or orders, may maintain an action against the bank for the money in his own name, or he may assign his interest therein and the assignee maintain the action in his name. *McLaughlin v. First Nat. B'k*, 406.

#### **Trustee of an Express Trust.**

5. Such a depositor is also a trustee of an express trust within the meaning of § 79, C. C. Pro., which provides that such trustee includes "a person with whom, or in whose name, a contract is made for the benefit of another," and he could sue alone. *Id.*

### **BONDS.**

See *Municipal Corporations and Schools and School Districts*.

### **CHATTEL MORTGAGES.**

See *Assignment for Benefit of Creditors*.

Proof of execution, see *Evidence*, 1; damages on conversion, see *Damages*, 1, 2; rights of mortgagee, see *Trover and Conversion*, 2.

#### **Validity — Crops — Registration — Notice.**

1. Under § 1704, C. C., § 4328, Comp. L., providing that "an agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing to the extent of such interest," a chattel mortgage given by one on crops to be grown on his land is valid, and when the instrument is properly witnessed and filed for record it is valid against creditors and subsequent purchasers of the mortgagor. It is not necessary that it should be re-filed after the property comes into existence; it is sufficient if it was on file when their interest attached. *Grand F. Nat. Bank v. Minneapolis & N. S. Co.*, 357.

#### **Assumption.**

2. Where, to secure the purchase-money for certain lands, the purchasers gave a chattel mortgage on the crops to be raised on the land the ensuing season, and the mortgage was duly filed for record in conformity to statute, but before the crop was sowed the purchaser sold the land to M., and he, as a part of the consideration, assumed the payment of the mortgage by parol and agreed that it should be and remain as binding a lien upon the crop to be raised as if no change in ownership had taken place, *held*, that the mortgagee had no right to the crop as against M.'s creditors, although they knew of the mortgage prior to the rendition of the judgment under which their rights attached. *Bouton v. Haggard*, 32.

#### **Filing, Effect.**

3. In this jurisdiction the filing of a chattel mortgage is equivalent to an actual delivery and continued change of possession of the property mortgaged, as such act saves it from the operation of section 2024, C. C., declaring fraudulent and void all transfers not accompanied by an actual and continued change of possession of the things transferred. *Reichert v. Simons*, 239.

#### **Possession — Fraud — Burden of Proof.**

4. Where a chattel mortgage has been duly filed, the fact that the mortgagor remains in possession of the property, furnishes, of itself, no evidence

of fraud. In such case, where a creditor attacked the mortgage for fraud, it was held proper to instruct the jury that the burden of proof was upon him to establish that it was fraudulent. *Id.*

**After-Acquired Property.**

5. A mortgage of a stock of goods and such goods as might thereafter be added to the stock "by way of replenishing" it, is valid under section 1704, C. C., which provides that "an agreement may be made to create a lien upon property not yet acquired." This replenishing provision would not render the instrument void on its face, for of itself, it would give no right to sell except to replenish. *McKay v. Shotwell*, 124.

**Trial — Question of Law.**

6. Where in such case the mortgaged property had been attached and there was no evidence of fraud in fact, or that the mortgagors, while in possession, had disposed of any of the mortgaged property for their own benefit, *held*, proper for the court to direct a verdict in favor of the mortgagee in an action of replevin against the parties who had taken it from his possession on the attachment. *Id.*

**Evidence — Materiality.**

7. In an action of replevin by a mortgagee against attaching creditors, the issue being the validity of the mortgage, the fact of whether or not the mortgagee in foreclosing the mortgage after the attachment had been made had given the requisite notice, or the fact of the amount of the property they sold, is immaterial. So, also, the mortgagors being in possession after the execution of the mortgage and prior to the attachment, it not appearing that they had disposed of any of the property during the time. *Id.*

**CLAIM AND DELIVERY.**

*See Chattel Mortgages; Replevin; and Trover and Conversion.*

**CODE CITATIONS.**

**POLITICAL CODE.**

Sec.	Chap.	Page.	Comp. L.	Sec.	Chap.	Page.	Comp. L.
17...	28....	189, 205....	.....	10.....	40.....	337....	.....
14.....	38.....	292....	2462				

**CIVIL CODE.**

849.....	246 ..	3473	1707.....	366....	4331
909.....	155....	3533	1714.....	454, 456....	4338
953.....	150....	3577	1715.....	454, 456....	4339
1499.....	474....	4123	1722.....	282....	4346
1515.....	474 ..	4189	1727.....	370, 455....	4351
1536.....	473.. .	4160	1733.....	128....	4358
1538..	473....	4162	1734.....	128....	4359
1539.....	478....	4163	1735.....	245....	4360-5
1541.....	443....	4165	1744.....	368....	4379
1542.....	465, 466....	4166	1970.....	296, 481...	4603
1543.....	465, 466, 496....	4167	2020..	418 ...	4658
1544.....	443, 465, 466....	4168	2024.....	242....	4657
1704.....	366....	4328	2027.....	419, 420, 430....	4660
1706.....	366....	4330			

**CODE CIVIL PRO.**

74.....	411, 413....	4870	149.....	403, 404....	4945
76.....	411, 413 ...	4872	236.....	163....	...
104.....	376....	4900	303.....	375....	5107
122.....	167....	4918	522.....	375....	5336
123..	167....	4919	679.....	395....	5501
124.....	167....	4920	721.....	403....	5543



Sec.	Page.	Comp. L.	Sec.	Page.	Comp. L.
722.....	408....	5544	725.....	403, 404....	5547
723.....	408....	5545	726.....	408....	5548
724.....	403....	5546	727.....	403....	5549

#### JUSTICES' CODE.

2.....	177....	6042	84.....	174, 176....	6073
83.....	179....	6072	87.....	178....	6076

#### PENAL CODE.

184.....	149 ...	6384	493.....	176 ...	6694
492.....	176....	6693			

#### CODE CRIMINAL PRO.

214.....	487....	7241	877.....	493....	7405
222.....	487....	7249	524.....	150....	7575
235.....	150....	7262	525.....	150....	7576
256.....	487....	7283			

### CONFLICT OF LAWS.

See *Limitation of Actions*.

### CONSPIRACY.

Sufficiency of indictment, see *Criminal Law*, 1.

### CONSTITUTIONAL LAW.

#### Executive Power—Office and Officer—Removal.

1. The power of removal from office is not judicial in the sense that it cannot be exercised by the executive, either with or without notice to the incumbent proceeded against. *Territory v. Cox*, 501.

2. Under the public examiners act, chap. 124, L. 1887, §§ 3, 4, Comp. L., §§ 119, 120, authorizing the examiner to "make an exhaustive examination of the books and accounts" of the public "institutions" of the territory, and "report to the governor the result of his examination," and providing that "the governor may cause the results of such examinations to be published, or, at his discretion, to take such action for the public security as the exigency demand," *held*, the governor, upon the receipt of an examination, had the power to remove from office the trustees (managing officers) of the public institution examined. *Id*.

#### Filling Vacancies.

3. Sec. 8, chap. 22, Pol. C., § 1392, authorizing the governor to fill "all vacancies" in territorial offices, is not in conflict with § 1858, R. S. U. S., which authorizes the governor of any territory to fill a vacancy in such office when it "happens from resignation or death," and the governor may, under the territorial statute, fill a vacancy occasioned by removal. *Id*.

#### Legislative Power—Special Legislation.

4. Under the act of congress, approved July 30, 1886, prohibiting special legislation by the territories, chap. 173, L. Dak. 1887, "providing for re-locating county seats," which by its terms could apply to only one county, is void. *Adams v. Smith*, 94.

#### Licensing Peddlers.

5. Section 80, chap. 28, Pol. C., § 2433, Comp. L., requiring peddlers of "merchandise not manufactured within the limits of this territory," to pay a license, is unconstitutional as a discrimination against goods manufactured in other states and territories. *Rodgers v. McCoy*, 238.

#### Police Powers.

6. A statute, § 16, chap. 17, Special L. 1885, exempting ten counties of the

territory from the operation of § 747, C. C. Pro., as amended, chap. 115, L. 1888, declaring owners liable for all damages done by their stock while trespassing "upon the lands of another," is valid. Such exemption is within the police power of the legislature; *Sprague v. Fremont, E. & M. V. R. R. Co.*, 86.

7. In such exempted locality the rule of the common law, making stock on the lands of another trespassers, does not obtain. *Id.*

8. Where in such locality S.'s stock strayed upon the defendant's railroad track, and it appeared the engineer saw it a mile and a half distant, but did not discover its presence on the track until he was about sixty rods from it; that he then whistled for brakes; they were applied, also the air brakes; that it was down grade and there was a train of thirteen loaded cars; that the stock, instead of leaving the track, ran ahead of the train, when one was caught and killed; that the others gathered around this one, and another train following close behind ran into them and injured two others; that the engineer of the second train did not see the stock till within five rods of it; *held*, it was a proper case to submit to the jury. *Id.*

8. Section 55, chap. 29, Pol. C., Comp. L., § 1362, authorizing county commissioners to grant ferry leases to the highest bidders, is not invalid as being in conflict with § 1889, R. S. U. S., prohibiting the legislatures of the territories from granting "especial privileges," as such power is a proper police regulation. *Evans v. Hughes County*, 102.

#### **Taxes, Local — Foreign Use — Validity.**

9. Section 17, chap. 28, Pol. C., as amended in 1885, providing that personal property in any unorganized county shall be subject "to taxation in the nearest organized county," is invalid in so far as it permits the collection of a county tax in an unorganized county for the use and benefit of the organized county. *Farris v. Vannier*, 186.

10. A territorial tax collected under this section in an unorganized county is not invalid, nor is the section (there being no authority for taxing the real estate in such counties) in conflict with § 1925, R. S. U. S., prohibiting the legislature from making "any discrimination in taxing different kinds of property," nor is the section local or special in its nature. *THOMAS, J.*, dissenting. *Id.*

### **CONTRACT.**

Construction, see *Statutes*, 1; validity, see *Appeal*, 13.

#### **Validity — Public Policy — Specific Performance — Certainty — Recoupment.**

1. A national bank having a mortgage on the property of a corporation, and holding the greater part of its capital stock, entered into a contract with L. to sell to him the entire property of the corporation, agreeing to foreclose the mortgage and to procure title for him thereunder. The bank delivered a part of the stock under the contract, and L. made several payments thereunder. The bank assigned the mortgage to P., who knew of the contract. The bank having failed, a receiver was appointed. P. commenced an action to foreclose the mortgage, making L. and the receiver parties. L. answered, asking a specific performance of the contract, or that the amounts paid by him be applied in reduction of the mortgage debt. *Held*, 1, that the contract was void on the ground of public policy; 2, that it was not sufficiently definite and certain to be specifically enforced; 3, that the payments in part performance could not be used in recoupment of the mortgage debt. *Peck v. Levinger*, 54.

#### **Compounding Felony — Nature of Proof.**

2. Where it is sought by parol to invalidate a written agreement on the ground of its having been made to compound a felony, such fact must be established with clearness and certainty. Its existence should be free from doubt. Mere threats of prosecution, whatever may have been their effect, are not sufficient so long as they were not coupled with expressions that would naturally lead the party to infer that if the contract was entered into no prosecution would follow. *School District v. Alderson*, 145.

### Sufficiency of Proof

3. In such a case, where it appeared there was a deficit in the accounts of a school district treasurer, and there had been a contention between him and his successor with reference to it, and the latter stated he would settle the matter and stop the prosecution if the defaulting treasurer would pay a certain amount and give a note (the one in suit) signed by A., who testified he would not have signed the note if it had not been agreed to stop the prosecution, but it did not appear a criminal prosecution was referred to, or that one of any kind was pending; nor did it clearly appear what the terms of the agreement were; nor was it shown that the school district authorized the alleged unlawful agreement to be made, or that it had any knowledge thereof after accepting the note. *Held*, a verdict was properly directed in favor of the district in an action on the note. *Id.*

### Parties — Privity.

4. There is no such privity of contract between a lessor and the assignee of a lease as will enable the latter to maintain an action against the former to recover back the consideration paid for the lease (under a claim the lease was void), even though it be admitted the consideration paid belonged to the assignee. *Evans v. Hughes County*, 102.

### Modification — Sufficiency of Evidence.

5. The modification of a written contract by a parol agreement must be clear and satisfactory. *Buttz v. Colton*, 306.

### Performance.

6. A contract provided that the work should be done in a good, substantial, workmanlike manner to the satisfaction of a certain engineer; *held*, that the engineer's certificate of satisfaction was sufficient to show performance and it was not necessary, in an action on the contract by the contractor, to go further and prove that the work had been done in the manner required. *McGuire v. City*, 346.

### Certificate — Form — Sufficiency.

7. Where a contract provided that the work should be done to the satisfaction of a certain engineer evidenced by his certificate, and the engineer certified that the contractor "has completed his contract according to the specifications and is entitled to the full contract price for the balance thereof," *held*, the certificate was sufficient in form and showed that the work had been done to the satisfaction of the engineer. *CARLAND, J.*, dissenting. *Id.*

### Rescission.

8. On an issue of the right to recover on a bank check, it appeared the check had been given by the defendants to the plaintiffs on a settlement of differences as to the right to the possession of certain personal property. The defendants contended, however, that when the check was given the plaintiffs represented that the property was in as good condition as at a prior date, whereas, in fact, it was not, and it had, by the acts of the defendant, been damaged to an amount far in excess of the check. They also contended they held a prior and paramount lien upon the property by virtue of a chattel mortgage duly recorded. At the trial it appeared the plaintiffs were rightfully in possession of the property under proceedings in claim and delivery, and that defendants obtained possession on the settlement of the case by means of this check. It also appeared the defendants had not returned the property to the plaintiffs, or offered to do so, whereupon the court directed a verdict in favor of the plaintiffs for the amount of the check. *Held*, 1. That the direction was proper. 2. That the surrender of the possession of the property, and the dismissal of the claim and delivery action, was a sufficient consideration for the check. 3. That the fact that the defendants held a prior mortgage on the property, and the plaintiffs had taken it without paying off the mortgage as required by section 1754, C. C. (claiming it was void), would not have warranted the court in directing a verdict for the defendants. *McMahon v. Plummer*, 42.

**CONVERSION.**

See *Trover and Conversion*.

**CORPORATIONS.****Existence — Estoppel.**

1. One having contracted with a corporation as such will not be permitted in an action on the contract to question its corporate existence. *School District v. Alderson*, 145.

**Foreign — Right to Sue — How Raised.**

2. The defense that a foreign corporation has no authority to sue must be raised by answer. A denial of an allegation of the complaint that "it was authorized to transact business in the territory" does not raise an issue of fact, nor does an answer alleging merely legal conclusions even though there is a voluntary reply supplying the omissions, but not considered by the court, for a record would not be presented that could be considered by the appellate court. *Gull R. L. Co. v. Keefe*, 160.

**COSTS.**

Rights to, see also *Jurisdiction*, 4.

**Right to, on Appeal — What Recoverable.**

1. Under § 1, sub. 3, chap. 11, L. 1883, Comp. L., § 5187, allowing the prevailing party costs "for making and serving a case \* \* containing exceptions," *held*, that such party was entitled to this allowance in the supreme court, where he had made a motion for a new trial in the court below, "on the minutes," and to review the motion he prepared and served a bill of exceptions. *First Nat. B'k v. North*, 136.

**Stenographer's Fees.**

2. In such case the fees paid the stenographer for a transcript of the proceeding from which to prepare the bill is taxable under § 4, chap. 52, L. 1879; Comp. L., § 484, providing that stenographer's fees for transcripts "shall be taxable costs." *Id.*

**COUNTER-CLAIM.**

See *Set-off and Counter-claim*.

**COUNTIES.****Officers — Powers.**

The board of county commissioners has the power to change the boundaries of the commissioner districts of the county. *Territory v. Board*, 89.

**COVENANT.**

See *Mortgage*, 3.

**CREDITORS' BILL.**

Right to file, see *Equity*, 1, 2.

**CRIMINAL LAW.****Conspiracy — Indictment — Sufficiency.**

1. An indictment for conspiracy to defraud under § 5440, U. S. R. S., alleged that the defendants R., C. and H. on the 28th day of March, 1888, at Sioux Falls, Dakota Territory, within the jurisdiction of this court, did conspire, combine, confederate and agree together, with intent to defraud some person

to the grand jurors unknown, unlawfully to falsely make, forge and counterfeit a certain obligation and security of the United States, known as a certificate of deposit with the assistant treasurer of the United States on account of the appropriation for surveys of the public lands; that the said H., together with the said persons in execution of the last-mentioned premises, and in pursuance of, and to effect the object of said conspiracy, combination and agreement between themselves, afterward, on the 6th day of April, 1882, at said place, did unlawfully and with intent to defraud some person to the grand jury unknown, falsely make a certain paper and writing in words and figures following: [This is an assignment of the certificate by George Beeker, the payee thereof. As to the form and sufficiency of this for the purpose intended, no question is made.] Which said paper and writing was then and there intended by the defendants to falsely represent and purport to be a written assignment by George Beeker of a certain pretended obligation and security of the United States; that afterward on said 6th day of April, 1882, at said place, the said C., in pursuance of and to effect the object of the conspiracy aforesaid, did falsely and fraudulently and with intent to defraud some person to the grand jurors unknown, paste and attach the paper and writing aforesaid to and upon a certain falsely made, forged and counterfeited obligation and security of the United States, which said falsely made, forged and counterfeited obligation and security was then and there in writing and as follows, to-wit: [The certificate of deposit is here given. Its sufficiency is not questioned], contrary, etc. *Held*, that the indictment did not state facts sufficient to constitute an offense. *United States v. Carpenter*, 294.

#### **Larceny — Indictment — Sufficiency.**

2. Under a statute defining larceny to be "the taking of personal property accomplished by fraud or stealth, and with intent to deprive another thereof," an indictment (omitting time and place) charging that the defendant "did fraudulently and feloniously steal, take and carry away divers bank bills, commonly known and denominated as national currency, of divers denominations, the numbers and denominations of which are to the grand jury unknown, of the amount and value of \$25, which said bills circulated and passed as money, and which were then and there the property and in the possession of one Bruno Theil, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the Territory of Dakota," is sufficient on motion in arrest of judgment. *Territory v. Anderson*, 300.

#### **Malicious Mischief, What Constitutes.**

3. Under § 2, chap. 62, Laws 1881, Comp. L., § 6980, providing a penalty for "willfully or maliciously" injuring "any neat cattle \* \* \* the property of another," there need be no express malice against the owner in order to constitute the offense, it is sufficient as to this if there was an intention to "injure" cattle, the property of another. *Territory v. Crozier*, 8.

#### **Indictment — Objections to, how Raised.**

4. An objection that an indictment does not show that the grand jury was impaneled, charged and sworn, or that it was not found, or presented at a term of court, cannot be raised for the first time after conviction where by statute such objections are required to be presented before plea, and an omission to do so precludes their afterward being raised. *Territory v. Pratt*, 483.

#### **Witnesses — Competency.**

5. Under § 256, C.Crim.Pro., providing that an indictment must be set aside when the names of the witnesses examined before the grand jury are not indorsed on the indictment, it is not error to permit witnesses whose names are not found on the indictment to testify for the prosecution on the trial. *Territory v. Godfrey*, 46.

#### **Evidence — Competency.**

6. On an indictment for assault with intent to commit a rape on a child six years old, the court permitted the mother to testify that the child made immediate complaint of the assault, and also that she complained of pain in her abdomen. *Held*, proper. *Id.*

**Special Plea — Sufficiency.**

7. A plea that the defendant has already been convicted of the offense charged in the indictment and was thereafter acquitted by the judgment of the court, is a nullity. It is not sufficient either as a plea of former conviction or acquittal. *Territory v. King*, 131.

**Trial — Statement of Issue — Sufficiency.**

8. Section 343, C. Cr. Pro., provides that in a prosecution for felony, "the clerk or district attorney must read [the indictment] and state the plea of the defendant to the jury." Where these directions had not been complied with, but it appeared the district attorney stated the offense charged, and the defendant's plea to each juror as he was being impaneled, and that after the jury had been sworn to try the case, in his opening remarks, he stated to them the allegations of the indictment in substance, the plea and the proof he expected to introduce. *Held*, that the jury were sufficiently informed of the issue they were to try, and the denial of a new trial for the omission stated was proper. *Id.*

**Instructions as to Agreeing upon Verdict.**

9. A jury having been out twenty-eight hours in a prosecution for felony, and having been brought in for further instructions, the court, after giving the instructions, stated to them: "I think you will be able to arrive at a verdict in this case; the case has been twice tried at a great deal of expense to this county, and it seems to me, gentlemen, that you ought to agree on a verdict." *Held*, that while these remarks were objectionable, they would not warrant setting aside the verdict. *Id.*

**Jury — Separation.**

10. Where, in a prosecution for felony, the jury separated after the case had been finally submitted to them, but it appeared that none of the jurors had had any communication with any one during their separation respecting the matter under consideration, *held*, their verdict should not be disturbed. *Id.*

**Verdict — Impeachment.**

11. A verdict cannot be impeached by the affidavits of the jurors. *Id.*

**DAMAGES.**

See *Action*, 1, 2; *Trover and Conversion*, 3, 4.

**Measure, on Conversion of Mortgaged Property.**

1. Where a mortgagee had taken possession of the chattels under the conditions of the mortgage and had necessarily incurred expenses in keeping them until they were taken by the defendant on an attachment against the mortgagor, it was *held*, in an action of trover, that if the mortgagee was entitled to recover he could recover these expenses in addition to the amount of the debt and interest, where the mortgage provided that he could take possession, hold or dispose of the property, retain the amount of the debt, interest "and such other expense as may have been incurred." *Lander v. Propper*, 64.

2. In an action by a second mortgagee against a sheriff to recover for the conversion of the mortgaged chattels, where the first mortgagee had recovered what was due him on account of the conversion, the second mortgagee's recovery should be limited to the difference between the value of the chattels and the prior recovery where the value is less than the amount of the two mortgages. *Straw v. Jenks*, 414.

**DEFAULT**

Vacating, see *Judgment*, 1, 2.

**DEPUTY.**

See *Sheriff*.



**DIVORCE.**

Vacating decree, see *Jurisdiction*, 1, 2, 3.

**ELECTIONS.**

See *Parties*.

**EQUITY.**

See also *Contract* and *Subrogation*.

**Creditor's Suit — Right of Action Under the Code.**

1. Where a complaint in a creditor's suit alleged that the defendant T., at the time of incurring the obligation, was solvent; that thereafter he made conveyances of his property for the purpose of defrauding his creditors and pretended to have become insolvent; that the plaintiff had recovered judgment, issued execution thereon, and the same had been returned unsatisfied; that prior to the rendition of the judgment, T. had purchased land with his own means and, for the purpose of defrauding his creditors, caused the conveyance to be made directly to his wife, who was cognizant of his fraudulent purposes, *held*, in an action against T. and his wife to subject the land to the payment of the judgment, that the complaint stated facts sufficient to constitute a cause of action, and that proceedings supplementary to execution would not afford an efficacious remedy in such a case. *Feldenheimer v. Tressel*, 265.

2. The design of supplementary proceedings is to summarily determine the property of the debtor liable to execution. Third persons cannot be made parties, nor can their rights, or titles, be passed upon therein. For the purpose of reaching equitable assets, or setting aside fraudulent conveyances, these proceedings do not afford an adequate remedy. *Id.*

**ESTOPPEL.**

See also *Corporations*; *Municipal Corporations*; and *Schools* and *School Districts*.

**Equitable — Sufficiency of Facts.**

1. On an issue of equitable estoppel in an action to foreclose a mechanic's lien, arising between a sub-contractor, the plaintiff, and the owner of the premises, it appeared the sub-contractor's agent, on the owner's inquiry, said the contractors were not owing the plaintiff to any great amount, that they were straightforward and all right. It also appeared the purpose of the inquiry was not disclosed. The agent's statements were made away from the office and the books were not accessible. There appeared no design to in any way mislead the defendant, nor did the facts show any gross negligence on the part of the agent in making the statements. *Held*, assuming it to be a case where an agent could estop his principal, the facts would not warrant an estoppel. *Gull R. L. Co. v. Keefe*, 160.

**Use of Alternative Right.**

2. Where a railroad company had been granted a right of way over the public lands of the United States, and, also, power to condemn such right over the lands of private parties, *held*, that where it had condemned a right of way over public land of which one was in possession under the pre-emption laws of the United States and had paid the money into court, for the owner, it could not, after the occupant had received his patent, contest this right to the money. *Held*, also, that the company was an improper party to a proceeding to get the money out of court. *Northern P. R. R. Co. v. Jackman*, 286.

**EVIDENCE.**

Competency, see *Attorney and Client*; *Criminal Law*, 6; *Principal and Agent*, 1, 2; Materiality, see *Chattel Mortgages*, 7; sufficiency, see *Appeal*, 9, 21; *Contract*, 3, 6; *Insurance*, 3; *Master and Servant*, 2; *Railroad Companies*, 3, 6; *Specific Performance*, 1; *Statutes*, 1; *Trover and Conversion*, 1.



### Chattel Mortgage — Proof of Execution.

1. Section 498, C. C. Pro., provides: "Every instrument in writing, which it acknowledged or proved, and duly recorded, is admissible as evidence without further proof." Section 1749, C. C., provides: "A mortgage of personal property must be signed by the mortgagor in the presence of two persons, who must sign the same as witnesses thereto, and no further proof or acknowledgment is required to admit it to be filed." The court, without proof of execution, allowed the plaintiff to put in evidence a chattel mortgage that had been filed for record. The complaint which was for the conversion of the property mortgaged, alleged its execution; the answer denied all of the allegations of the complaint, but contained a statement that the only claim of the plaintiff to the property was under a written instrument, in form a chattel mortgage, and that it, at the time of its execution, was fraudulent and void. *Held*, that if proof of execution was not dispensed with by § 498, its execution was admitted by the answer and there was no error in allowing it to be read in evidence. *Lander v. Propper*, 64.

### Documents — Admissibility.

2. On a prosecution for perjury, alleged to have been committed while the defendant was testifying in his own behalf on a preliminary examination for selling intoxicating liquors in violation of law, the court, over an objection of relevancy and incompetency, permitted the prosecution to put in evidence, and the jury to take with them on retiring for deliberation a transcript of the committing magistrate's docket showing the proceedings on the examination, and his finding that there was sufficient cause to believe the defendant guilty of the offense. *Held*, error. *Territory v. Jones*, 85.

### Parol to Vary Written Instrument.

3. In an action of replevin against a mortgagee of an entire stock of goods, the court permitted the plaintiff to show that at the time the mortgage was given it was agreed between the parties that the plaintiff, a creditor of the mortgagors, might take from the stock a sufficient amount to pay his debt, and that it was on this condition the mortgage was given. *Held*, error. *Dean v. First N. Bk.*, 222.

### Subscribing Witness.

4. In a prosecution for obtaining property under false pretenses, the pretenses being with reference to the transfer of an alleged fraudulent mortgage, the court admitted the mortgage in evidence without calling subscribing witnesses. *Held*, proper. *Territory v. Ely*, 128.

## EXCEPTIONS, BILL OF.

Necessity of, see *Appeal*, 8.

## FALSE PRETENSES.

### Defense — Sufficiency.

Though one might be personally liable on his assignment of an instrument, still, that would furnish no defense for obtaining money under false pretenses by means of the assignment. *Territory v. Ely*, 128.

## FEES.

See *Costs*.

## FORCIBLE ENTRY AND DETAINER.

### Statute — Construction.

The design of the forcible entry and detainer statute is to furnish one entitled to the possession of land a summary remedy to recover the same as against a mere trespasser or intruder. In such action the defendant may show the character of the plaintiff's possession on which a recovery is sought, also

the character of his own right to the premises in controversy. While the language of the statute gives a right of action for a wrongful entry upon another's actual possession, it must not be construed to mean a possession obtained by force, and so held against the rightful claimant, nor is a mere "scrambling" possession as against him sufficient to maintain the action. *Murry v Burris*, 170.

## FORECLOSURE.

Right of, see *Mortgage*, 4.

## FRAUD.

Liability for, see *Action*; see, also, *Chattel Mortgages*.

## GUARANTY.

Sufficiency of, see *Pleading*, 1, 2.

### Absolute — Notice — Waiver.

1. The defendant gave H. the following letter of guaranty, which was by her transmitted to the plaintiffs: "D. B. Fisk & Co. \* \* \* Gentlemen: \* \* \* Mrs. Hollenbeck is a friend of mine. \* \* \* I think she is deserving of aid and assistance, and I am willing to give it. \* \* \* I told her I thought you would let her have goods—a sale, not a commission—to be paid for as fast as sold, provided you were assured of your money without loss by guaranty from a party whose guaranty you were willing to accept. If you will send her goods as she may order, not exceeding \$300 due you at any one time, I will guarantee that you are paid in full. \* \* \* George W. Stone." *Held*, that this was an absolute guaranty, and that no notice of acceptance was necessary to render the defendant liable. But if the letter were construed as an offer of guaranty, the defendant, having communicated it through the debtor, waived the right of notice of acceptance to himself. *Fisk v. Stone*, 85.

### Compliance.

2. Where under such letter the plaintiffs sent the debtor goods at one time on her order to the amount of \$302.41 on a credit of four months, that being their usual time, *held*, they did not exceed the guaranty so as to entirely discharge the defendant. *Id.*

## HABEAS CORPUS.

Unlawful detention, see *Constitutional Law*, 5

## HOMESTEAD.

Incumbering of, see *Mortgage*, 2.

### Character of Estate to Constitute.

There being no qualification in the homestead act as to the character of the estate, a judgment debtor may claim a homestead in an undivided interest in land. The test is, if the interest is such that it could be sold on execution, it can be claimed as a homestead against a creditor. *Oswald v. McCauley*, 289.

## INDICTMENT.

Sufficiency of, see *Criminal Law*, 1, 2, 4; *Rape*, 1.

## INSURANCE.

### Policy — Forfeiture — Breach of Condition.

1. Where a policy of insurance provided that it should become void on assured's mortgaging the property without the consent of the company indorsed on the policy by the superintendent, the company is not estopped from in-

sisting on a breach of this condition from the fact of its mere soliciting agent giving the assured to understand at the time he took the application that the giving of mortgages would not affect the policy when the company by its general officers had no knowledge of the understanding until after suit had been commenced. *Smith v. Continental Ins. Co.*, 433.

2. A condition in a policy rendering it void on procuring additional insurance without the consent of the company indorsed on the policy by the superintendent, is not waived by an agent of the company, whose business was to select soliciting agents, receiving notice thereof from the assured, where such agent had never given permission for procuring the insurance, and his agency had terminated a few days before the mailing of the notice. *Id.*

#### **Waiver — Evidence.**

3. Where the premium has been earned prior to a forfeiture, its subsequent receipt is not inconsistent with a defense based on the forfeiture, nor is it evidence of a waiver thereof, although the period for which the policy was given had not expired. *Id.*

#### **Premium Note — Liability.**

4. An insurance note contained a provision "that in case of default in the payment of any of the installments herein, the whole amount remaining unpaid on the note shall immediately become due and payable." The application and policy were "for the period of five years," and provided that, "if any payment on the note given for premium hereon be not paid when due, the policy shall be void until the same is made, when it is to again attach." The assured made default in the payment of the first installment and the company brought an action on the note for the entire amount. *Held*, it could recover, and that assured was not entitled to a deduction for the alleged unearned premium maturing after the default. *St. Paul F. & M. Ins. Co. v. Coleman*, 458.

5. Although the insured in his application, without fraud, makes such a misstatement of material facts as would, if pleaded, defeat a recovery on the policy, still that would furnish no defense in an action on his premium note, notwithstanding § 4167, Comp. L., which provides that "a person insured is entitled to a return of the premium \* \* \* when by any default of the insured other than actual fraud, the insured never incurred any liability under the policy." *St. Paul F. & M. Ins. Co. v. Neidecken*, 494.

#### **Incumbrances — Waiver — Agent — Authority.**

6. On an issue of the agency and authority of a certain insurance firm to waive, by its knowledge of the facts, the condition of a policy requiring all incumbrances to be stated in the written application, it appeared the firm received the application and the premium for the insurance; that they were transmitted to the company by the firm through one P.; that the company sent the policy direct to P.; that it was thereafter delivered to the assured, by said firm; that the company had never had any dealings with the firm, or knew of its existence until the time of the trial, and knew nothing of the incumbrances until after the loss. *Held*, the firm was such an agent of the company as would enable it to waive the requirement of the condition. *Lyon v. Ins. Co.*, 67.

#### **Warranty — Statement of Agent.**

7. In an action against an insurance company for a loss sustained by fire, it appeared, by an agreed statement of facts, that the assured warranted the statements in his application true so far as known and material to the risk; that in answer to the question, "Do all stove-pipes pass into good brick chimneys?" he answered, "One in iron pipe four inches from wood. Will build chimney in spring." That the company's agent in answer to a question to him in the application (and which was a part of the application) pronounced the stove-pipe perfectly safe and advised the risk; assured did not build the chimney in the spring and continued the use of the pipe thereafter when the fire occurred, being first discovered in the roof of the insured building. *Held*, the company was liable for the loss. *Waterbury v. Dakota F. & M. Ins. Co.*, 468.

## INSTRUCTIONS.

Abstract, see *Trover and Conversion*, 3; as to agreeing upon verdict, *Criminal Law*, 9; stating the evidence, *Statutes*, 5.

## INTERVENTION.

### Right of.

Where a receiver was permitted to intervene in an action, but it appeared the company for which he was receiver had assigned away all its interest in the fund in controversy prior to his appointment, *held*, he had no claim as against the assignee. *McLaughlin v. First Nat. B'k*, 406.

## INTOXICATING LIQUORS, SALE OF.

Construction of statutes, see *Statutes*, 4, 5, 6, 7.

## JUDGMENT.

Appealable, see *Appeal*, 2; vacating, see *Jurisdiction*, 3.

### Opening — Jurisdiction.

1. Where by mistake of fact an attorney consented to the rendition of a judgment against his client for an amount in excess of what the other party was entitled to, and within sixty days after the discovery of the mistake the client applied to have the judgment vacated, and for leave to defend as to the excess, but the term had passed and more than a year from the rendition of the judgment had expired, *held*, the court could grant no relief either at common law, or under § 143, C. C. Pro., which provides that the court "may \* \* \* in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." *Yerkes v. McHenry*, 5.

### Practice — Order — Validity.

2. Under § 143, C. C. Pro., authorizing the court, in its discretion, and upon such terms as may be just, to allow an answer to be made after the time limited by law, "or by order enlarged such time," a judge, after the time to answer had expired, granted a defendant an order for further time to answer upon an *ex parte* application. The plaintiffs were not served with the order, but were informed of it. The judge of the district being absent from the territory, the plaintiffs (under a statute authorizing another judge to act in such case) applied to, and obtained a judgment by default from another judge during the existence, and while they were aware of the extension order. The defendant thereafter, and within the time granted, served his answer, and then moved to vacate the default judgment. This the court, by the judge who gave the time, granted without terms under the same section which provided that the court "may also, in its discretion, and upon such terms as may be just, \* \* \* relieve a party from a judgment, \* \* \* taken against him through his mistake, inadvertence, surprise or excusable neglect." *Held*, the judgment was properly vacated, and that while the order granting further time was irregular, the plaintiffs were bound by it, and not in a position to complain of a want of terms. *Warder v. Patterson*, 83.

## JURISDICTION.

On appeal, see *Appeal*, 1, 2, 3; to vacate judgment, see *Judgment*, 1; see, also, *Justices of the Peace*.

### Motion — Notice — Service — Sufficiency.

1. On an issue of the sufficiency of the service of a notice on the plaintiff to vacate a judgment in his favor rendered some three years before, it ap-

peared the notice was served on one of his attorneys of the firm of record (the firm having in the meantime been dissolved); that the attorney served appeared to question the sufficiency of the service merely, and stated he had not been employed to resist the motion, but that he had informed the plaintiff of its pendency and had received a message from him that affidavits in resistance of the motion had been sent to him, the attorney, and those affidavits were afterward used on the hearing. *Held*, the court acquired jurisdiction of the plaintiff to determine the motion. *Beach v. Beach*, 371.

#### **Service by Publication, Affidavit for — Sufficiency.**

2. Where by § 104, C. C. Pro., it is provided that "where the person on whom the service of the summons is to be made cannot, after due diligence, be found within the territory, and that fact appeared by affidavit to the satisfaction of the court or a judge thereof \* \* \* such court or judge may grant an order that the service be made by the publication of a summons," and the affidavit for publication in a case when such service could be had stated, that the defendant could not, after due diligence, be found in the territory, and that the plaintiff did not know his residence or whereabouts, and could not by reasonable diligence ascertain the same. *Held*, the affidavit was insufficient, and the judgment rendered thereon void. *Id.*

#### **Vacation of Void Judgment — Remedy.**

3. Where a judgment is void for want of jurisdiction it may be vacated by a motion made in the original action. *Id.*

#### **Costs, Right to.**

4. Section 5191, Comp. Laws, allows costs of course to the plaintiff in an action for money where he recovers \$50. It also allows costs to the defendant in such an action unless the plaintiff is entitled to them. *Held*, the effect of the section is not to limit the jurisdiction of the district courts and thereby be in conflict with the organic act, § 1866, Rev. St. U. S., conferring chancery and common law jurisdiction upon these courts. A party may bring such action in the district court, but if he recovers less than \$50 he will not be entitled to costs. *St. Paul F. & M. Ins. Co. v. Coleman*, 458.

### **JURY.**

Separation, see *Criminal Law*, 10.

#### **Competency of Juror.**

1. Where, on the examination of a juror as to his qualifications to sit in a prosecution for selling intoxicating liquors without a license, he stated he considered the sale of such liquors wrong even with a license and that a witness' being engaged in that business would affect his credibility with him (the juror), but that he would give his testimony the same consideration under all the circumstances as that of a witness in any other calling, and that its being a liquor prosecution would not influence his verdict, *held*, the trial court's denial of a challenge for actual bias ought not to be disturbed. *Territory v. Pratt*, 483.

#### **Verdict — Excessive.**

2. On a claim that a verdict for the value of certain property destroyed by fire was excessive, there was evidence that its value was greater, and again, evidence that it was less than that found by the jury. *Held*, (there being a substantial conflict in the evidence) the verdict could not be disturbed. *Pielke v. Chicago, M. & St. P. Ry.*, 444.

### **JUSTICES OF THE PEACE.**

See, also, *Appeal*, 4, 5, 6, 7; *Pleading*, 3.

#### **Jurisdiction — Actions Involving Title.**

1. In an action in a justice's court the defendant interposed an answer raising an issue of title and offered proof under it. Sections 10, 37, Justices'

Code, provide that when the title or boundaries of real property in any wise come in question the case shall be certified to the district court. *Held*, upon the offer of proof the jurisdiction of the justice ceased and the judgment afterward rendered was void. *Murry v. Burris*, 170.

#### **Appeal — Effect.**

2. That appealing in such a case is in effect certifying the case to the district court, as applied to the latter's jurisdiction — doubted. *Id.*

### **LARCENY.**

Sufficiency of indictment, see *Criminal Law*, 2.

### **LIMITATION OF ACTIONS.**

#### **Construction — Conflict of Laws.**

1. Where the statute of a state where a contract was made, provided that an action on such contract "must be commenced within" six years "after the cause of action has accrued," and an action on it there had become barred, *held*, the bar was available here. *Rathbone v. Coe*, 91.

#### **Pleading — Sufficiency.**

2. In such a case where the defendant sought to avail himself of the foreign statute, and in effect pleaded he had been in the foreign jurisdiction the prescribed period, so that he could have been served with process, *held*, the answer was sufficient although no facts were stated showing the statute to be one that affected the debt, rather than the remedy. *Id.*

### **MALICIOUS MISCHIEF.**

What constitutes, see *Criminal Law*, 3.

### **MANDAMUS.**

Proper parties, see *Parties*, 2, 3, 4.

#### **When it Lies.**

Where a board of county commissioners in the discharge of its duties had fixed certain licenses under a wrong statute, *held*, *mandamus* would lie to compel it to fix them under the right statute. *Territory v. McPherson*, 27.

### **MASTER AND SERVANT.**

#### **Duty of Master to Servant.**

1. It is the duty of a miller to furnish his servants with such machinery and appliances as are reasonably safe for the purposes for which they are used, and to also keep them in proper repair. *Schmidt v. Leistskow*, 886.

#### **Defective Machinery — Evidence, Sufficiency of.**

2. In an action against a mill-owner by a servant for injuries sustained through alleged negligence in the construction of the mill and machinery furnished, it appeared that the servant, in the performance of his duties, got upon a spout used for passing mill-stuffs from one part of the building to another, and it gave away, whereby his arm was precipitated into a set of cog-wheels; but the undisputed evidence was that the mill was constructed of the materials and in the manner such buildings usually were; that the spouting was of the character generally used in such mills and possessed the requisite strength for the purposes it was intended; also that prior to the accident, in the performance of a similar duty in a like manner, this same spout gave away with him on a former occasion and he helped repair it, using the same materials and placing it the same as before, so that it was no stronger than originally. *Held*, he was guilty of such contributory negligence as precluded a recovery. *Id.*



**Fellow-Servants, Who Are.**

3. Where two servants of the same master are engaged together in the accomplishment of a common object, the one having no control or authority over the other, they are co-employees within the meaning of the rule that exempts the master from liability to one for injuries received through the negligence of the other. *Id.*

**MECHANICS' LIENS.**

See, also, *Statutes*, 2.

**Jury Trial.**

Section 236, C. C. Pro., as amended by chap. 146, L. 1885, providing: "An issue of law must be tried by the court. \* \* \* An issue of fact for the recovery of money only, or specific, real or personal property, must be tried by a jury, unless a jury trial be waived. \* \* \* Every other issue is triable by the court, which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it," — does not give a right of jury trial in an action to foreclose a mechanic's lien. Such an action being equitable in its nature, and there being no right of trial by jury under this statute, the constitution, or any law of the United States, it was not error to refuse it. *Gull R. L. Co. v. Keefe*, 160.

**MORTGAGE.**

See, also, *Chattel Mortgages; Subrogation, and Taxes.*

**Rights of the Grantee of the Equity.**

1. In an action to foreclose by the assignee of a mortgage to secure future advances, an owner of the equity of redemption will be permitted to impeach a settlement as to the amount due, made by the parties to the mortgage after the conveyance of the equity. *First Nat. Bk. v. Honeyman*, 275.

**Extinguishment — Homestead, Incumbrance of.**

2. Under § 3, chap. 38, Pol. C., providing that an incumbrance of a homestead shall be of no validity unless signed by husband and wife, *held*, that after a mortgage on the homestead had been paid the husband alone could do no act whereby the mortgage could be revived for the purpose of securing another obligation. *Luce v. American M. & I. Co.*, 122.

**Release — Covenant — Warranty — Breach.**

3. Where, in a mortgage-deed of three lots with general covenants of warranty of the premises, it was provided one of the lots should be released upon the payment of a certain part of the debt, *held*, the mortgagor was entitled to a decree releasing the lot on the partial payment notwithstanding his title to the other two lots had failed where the granting clause of the mortgage was "all the right, title, interest, claim and demand" of the mortgagor to the lots. *Held, also*, there was no breach of covenant upon which the mortgagee could recover in such case. *Obern v. Gilbert*, 119.

**Foreclosure, Right of.**

4. A mortgage given to secure the payment of a promissory note, with "interest payable annually," contained a provision that "in case default should be made in the payment of said sum of money or any part thereof, \* \* \* then \* \* \* the whole, principal and interest, of said note shall, at the option of the holder thereof, immediately become due and payable." *Held*, that on default in the payment of an installment of interest, the holder, without notice of election, could foreclose by advertisement (a method allowed by statute) for the whole debt under a power to "sell \* \* \* in the manner now or that may hereafter be provided by law." *Hodgdon v. Davis*, 21.



## MUNICIPAL CORPORATIONS.

### School Districts — Implied Powers.

1. Though there may be no express power given to the district to provide furniture for the school-houses, under the act to establish public schools (chap. 14, Laws 1879), still, the general purposes of the act would necessarily imply this power, and authorize incurring obligations to that end. *Capital Bank v. School District*, 248.

### Warrants in Excess of Revenue — Validity — Ratification.

2. Where, by § 29, subds. 5, 8, chap. 14, L. 1879, the revenue a school district can raise in any one year is limited, and this limit had been exceeded by warrants of one issue for necessary improvements being made, but before the completion of the improvements two years had elapsed, and the amount of the warrants did not exceed the revenue that could have been collected for that period, *held*, the warrants were valid where the action of the school board in the premises had been approved by the district, and it had accepted and used the improvements. *Held, also*, that the inhabitants of the district had the power to ratify the action of the board. *Id.*

### School Districts — Powers.

3. School districts, being special statutory creations, have only such implied powers as are necessary to accomplish the purposes of their existence. *Farmers & M.'s Nat. Bank v. School District*, 255.

### Warrants, Validity.

4. Where a statute, § 29, subd. 4, chap. 14, L. 1879, required that the voters of a school district should select a site for a school-house, and the district board, without this having first been done, selected it, built a house and issued warrants therefor without the authority or ratification of the voters, *held*, the warrants were void. *Id.*

### Exceeding Revenue.

5. Where by § 29, subd. 5, chap. 14, L. 1879, there was a restriction on the amount of revenue a school district might raise in any one year, and a board in issuing certain warrants payable immediately, exceeding this limit, *held*, the warrants were void. *Id.*

### Estoppel.

6. A school district, in an action against it on its warrants, will be permitted to defend on the ground that the warrants were issued in excess of its powers. *Id.*

### Rights and Duties of Purchasers of Warrants.

7. Persons purchasing obligations apparently issued by municipal corporations must see that the powers of the corporation have not been exceeded. *Id.*

### Local Improvements.

8. Where a city has the power, to drain, improve, keep in repair and prevent obstructions in its streets, *held*, it had the power to make a contract to straighten the course of a large stream of water running in a "zigzag direction" through the city. *McGuire v. City*, 846.

### Ratification.

9. Where a contract of a city is not *ultra vires*, it is no defense in an action on it that it was irregularly made (not being by ordinance) where the city had received and retained the benefits derived from the contract. *Id.*

### Local Improvements — Estoppel.

10. A city charter provided that when the mayor and council deemed it necessary to grade any street or alley for which a special tax shall be levied,

they shall so declare by resolution, which shall be published for four consecutive weeks, and give resident owners of property liable to assessment twenty days within which to protest. The mayor and council without observing any of these provisions graded an alley and issued tax certificates therefor. *Held*, the certificates were void, and that a person by petitioning the council for the improvement was not estopped from questioning the proceedings of the council in issuing the certificates. *McLauren v. City*, 397.

## NEGLIGENCE.

See *Master and Servant*; *Pledge and Collateral Security*, and *Railroad Companies*.

## OFFICE AND OFFICER.

Removal, see *Constitutional Law*, 1, 2, 3; salary, see *Stare Decisis*.

## PARTIES.

Proper, see *Banks and Banking*, 1, 4, 5; *Estoppel*, 2; *Pleading*, 5.

### Interest, Sufficiency of—Elections—Contests.

1. Under § 6, chap. 54, L. 1885, providing that an elector of a county may contest the validity of an election to locate a county seat, *held*, such an elector could maintain an action, the purpose of which was to set aside the removal of a county seat, where the election therefor had been had under an invalid law. *Adams v. Smith*, 94.

### Taxes—Action to Recover Back.

2. Where taxes have been paid to a collector under protest and with notice that an action will be brought to recover them back, it is not necessary in such case to sue the municipality for which he is collector, the action may be brought against him personally. *Rushton v. Burke*, 478.

### Improper—How Raised.

3. The objection that the territory is improperly a party plaintiff in a *mandamus* proceeding cannot be raised by demurrer. *Territory v. McPherson*, 27.

4. Under § 696, C. C. Pro., which provides that the writ of *mandamus* "must be issued \* \* \* upon the application of the party beneficially interested," one engaged in the retail liquor business, and having property invested therein, has such interest as makes him a proper party plaintiff in proceedings to compel the county commissioners to fix the license for carrying on that business. The territory in such case is also beneficially interested. *Id.*

## PAYMENT.

Necessity to plead, see *Pleading*, 6.

## PENALTIES

See *Pleading*, 5.

## PLEADING.

Sufficiency, see *Limitation of Actions*, 2.

### Complaint—Guaranty—Sufficiency.

1. The complaint alleged that on the 21st of January, 1882, the plaintiff and defendant entered into a written contract, whereby the plaintiff appointed defendant his agent to sell his corn cultivators and wagons for the counties of M. and L.; that among other things defendant agreed to indorse, guarantee and by said contract guarantees the payment of all notes turned over to plain-

tiff in settlement for machines and wagons sold, waiving notice and protest; that on May 1st, 1882, defendant sold and delivered to A. one of said cultivators, and received in payment a promissory note, dated that day, due January 1st, 1888, whereby A. promised to pay to the order of said defendant \$48, with interest at ten per cent per annum until paid; that afterward said defendant assigned and delivered said note to this plaintiff, and there is due thereon \$48 with interest aforesaid. *Held*, the complaint did not state facts sufficient to constitute a cause of action. *Sames v. Spawn*, 16.

2. Where a complaint against a guarantor alleged that the defendant, in consideration that the plaintiffs would sell one H. certain goods, promised to be answerable for the same to an amount not exceeding \$300; that on the faith of said promise they did sell to said H. goods of the reasonable value of \$442.66; that H. did not pay for the same, excepting \$103.68, though requested so to do; that notice of demand on H. and non-payment had been given to the defendant; that demand of payment of \$300 had been made upon him, and that he had not paid the same, *held*, that the complaint stated a cause of action. *Fisk v. Stone*, 85.

### Sufficiency — Justice Court — Frauds, Statutes of.

3. Where in a justice's court the plaintiffs declared on a promise of the defendant to pay the balance due on a note from one H., if they would deliver to defendant certain negotiable paper H. had left with them as security for the payment of said note, and the defendant answered that he had never given any "written guarantee" to pay said note, and any verbal promise so to do "was merely done in jest," *held*, the answer was frivolous and that the justice properly rendered judgment for the plaintiffs on the pleadings. *Held, also*, that the complaint alleging the deposit of the securities for the purpose above stated by H., the agent of the defendant, defendant's promise to pay the balance due on said note within a reasonable time if plaintiffs would deliver said securities to him, the delivery of the securities, and that he had not paid the same within a reasonable time, though requested so to do, states a good cause of action. *Dodge v. Furber*, 217.

### Replevin.

4. In an action of replevin where the plaintiff (his complaint being in the ordinary form) sought to recover under a bill of sale for the defendant, the court, under a general denial, and plea of title and right of possession in the defendant, permitted him to introduce evidence tending to show that the bill of sale, though absolute in form, was in fact a mortgage. *Held*, proper. *O'Neil v. Murry*, 107.

### Penalty—Liability for.

5. By § 1785, sub. 6, C. C., a mortgagee, when his mortgage "has been satisfied," is required to execute and acknowledge a certificate of discharge. In case of refusal he is made liable to the mortgagor in a penalty of \$100. A complaint for this penalty alleged a tender after maturity of the amount due on the mortgage to the mortgagee, the owner and holder; its immediate deposit in his name with notice in a bank of deposit within the territory of good repute, its still remaining there, and his refusal to discharge the mortgage. On demurrer to this complaint it was held the tender and deposit operated as a satisfaction of the mortgage under § 849, C. C., which provides that "an obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor with some bank of deposit within this territory, of good repute, and notice thereof given to the creditor." *Kronebusch v. Raumin*, 248.

### Quo Warranto — Remedy — Parties.

6. Under § 2, chap. 112, L. 1883, Comp. L., § 705, providing that "townships having two or more villages \* \* \* may petition the county commissioners for a division, and whenever \* \* \* so petitioned they may \* \* \* divide such townships," an information in the nature of *quo warranto* by the district attorney against the supervisors of a township claiming to have been created by the division of H. township, alleged that on the 6th of April, 1888, the township of H. was a duly organized township of P. county; that on said date

the county commissioners of said county divided said township and out of a part thereof organized the township of B.; that the township of H. never had two or more incorporated villages; that the said commissioners were never petitioned by said township of H. for a division; that the petition upon which the said commissioners acted was signed by less than one-half of the legal voters of said township; that said petition was not signed by the supervisors of said township, or any of them; that the defendants were elected to the pretended offices of supervisors of said new township of B. and assume to hold, exercise, and are actually holding and exercising the functions of said offices; that after the said pretended organization the residents of the said B. township proceeded to act in all respects as if the said township had been legally organized; that the reason that all the residents of said township are not made parties to the action is, that there are over five hundred of them and it would be impracticable to bring them before the court, and their interests will be faithfully represented by the defendant supervisors. *Held*, 1. That *quo warranto* was the proper remedy. 2. That the district attorney was the proper party to bring the action, section 534, C. C. Pro., providing the "district attorney in the name of the territory, upon his own information," may bring an action against any person who shall "unlawfully hold or exercise any public office," or any number of persons who "shall act \* \* \* as a corporation without being incorporated." 3. That it was not necessary to join the alleged B. township. 4. That the information stated facts sufficient to constitute a cause of action. *Territory v. Armstrong*, 266.

#### **Payment, When Unnecessary to Plead.**

6. When in an action for the balance of an account it is alleged "no part thereof has been paid except" certain specified payments, the defendant, under a general denial, will be permitted to prove other payments than those stated in the complaint. *Brown v. Forbes*, 273.

### **PLEDGE AND COLLATERAL SECURITY.**

#### **Enforcement — Negligence — Evidence — Sufficiency.**

On an issue of a creditor's negligence in enforcing collateral securities (notes and a mortgage) the fact that the creditor placed them in the hands of reputable attorneys for collection would not warrant the court in directing a verdict in his favor on this issue where the evidence tended to show the security was lost by the negligence of the attorneys. *Plymouth C. Bank v. Gilman*, 304.

### **POLICE POWER.**

See *Constitutional Law*, 6, 8.

### **POOR DEBTORS.**

#### **Examination and Discharge — Appeal — Review.**

With reference to the examination and discharge of persons confined in jail on civil process, § 5547, Comp. L., provides that, "if upon such examination the judge before whom the same is held, shall be satisfied the prisoner is entitled to his discharge, he shall administer to him" the statutory oath. Under this section when an order of discharge has been made upon conflicting evidence, the only exception being to the final order, the supreme court cannot examine the evidence for the purpose of ascertaining whether a different conclusion might not have been reached. In such a case the only inquiry is, is the order supported by any competent evidence? If it is, it must be affirmed, otherwise, reversed. *CARLAND, ROSE and TEMPLETON, JJ.*, dissenting. *National G. A. Bank v. Rayman*, 402.

### **PRACTICE.**

See *Appeal; Judgment, and Trial*.

## PRINCIPAL AND AGENT.

### Evidence — Declarations.

1. The declarations of an agent, to bind his principal, must be made at the very time he is doing the act he is authorized to do, and must be concerning the act he is then doing. The rank of the agent can make no difference in the application of the rule. *First N. Bk. v. North*, 186.

### Appeal — Prejudicial Error.

2. On an issue that a chattel mortgage was fraudulent as against the creditors of the mortgagor (for the purpose of showing intent) the court admitted statements of the president of the mortgagee, made three days after the execution of the mortgage, at a time when an inventory of the chattels was being taken, to the effect that he marked the goods low "so parties would not attach." *Held*, inadmissible, and prejudicial error. *Id.*

## PROCESS.

Service of, see *Jurisdiction*, 1, 2.

## PUBLIC POLICY.

See *Appeal*, 13; *Contract*, 1.

## PUBLIC LANDS.

Water rights, see *Waters and Water-courses*

## QUO WARRANTO.

Parties; remedy, see *Pleading*, 5.

## RAILROAD COMPANIES.

See, also, *Constitutional Law*, 6. 7 8.

### Killing Stock — Evidence, Sufficiency.

1. In an action against a railroad company for killing a horse through alleged negligence, the undisputed evidence showed that the accident occurred at a place where there was a down grade; that the train was running from eighteen to twenty miles an hour; that the horse came upon the track from five to ten rods ahead of the engine; that the engineer immediately upon seeing the horse whistled and reversed the engine; that the brakes were applied and every thing done possible to prevent the accident; that the engine and cars were provided with the usual and necessary appliances for stopping them; that the employees in charge of the train were experienced and competent hands. It also appeared the horse was hobbled at the time of the accident. *Held*, the court ought to have directed a verdict in favor of the company. *Huber v. Chicago, M. & St. P. Ry. Co.*, 392.

### Statute — Construction.

2. By § 679, C. C. Pro., making the killing or injuring of stock by a railroad company *prima facie* evidence of negligence, it was the design of the legislature to create a presumption of law, not fact. Its only effect is to change the order of proof. It is merely a statute of procedure creating no new liability. Negligence in fact is as much the basis of recovery now as before, and if at the close of the case there is no evidence of negligence there can be no recovery. *Id.*

## RAPE.

### Assault with Intent to Commit Felony — Indictment — Sufficiency.

An indictment under § 292, Pen. C., prescribing a penalty for one "who is

guilty of an assault with intent to commit a felony," which charged that James Godfrey, et, etc., in and upon the person of Mary Lauterbach, a female child under the age of seven years, did make an assault, and her, the said Mary Lauterbach, did ill-treat, with an intent to ravish and carnally know her, the said Mary Lauterbach, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the Territory of Dakota; *held* sufficient, on objection to evidence under it, and on motion in arrest of judgment. *Territory v. Godfrey*, 46.

## RATIFICATION.

Sufficiency, see *Municipal Corporations*, 2, 9.

## REHEARING.

Power to grant, see *Appeal*, 1.

## REPLEVIN.

Survival of, see *Abatement and Revival*.

### Pleading — Verdict — Judgment.

In an action of replevin the plaintiff sought to recover under two chattel mortgages. The defendant, a sheriff with an attachment against the mortgagor, contended one of the mortgages was void, but did not resist recovery as to the other, only to the property or its value in excess of this mortgage. The jury returned a verdict finding the first mortgage "void," and that the plaintiff was entitled to the possession of the property, fixing its value and the plaintiff's damages. The court thereupon entered judgment that the defendant was entitled to the possession of the property or its value, in excess of the uncontested mortgage, together with costs and disbursements. *Held*, error, and, 1. Such a verdict is neither general or special, and an objection to its reception should have been sustained. 2. That the special finding was not sufficient to sustain the judgment. 3. That in such case it was necessary to order a new trial. *Rudolph v. North*, 79.

## RESCISSION.

See *Contract*, 8.

## SCHOOLS AND SCHOOL DISTRICTS.

See, also, *Municipal Corporations*.

### Creation — Bonds — Validity — Estoppel.

By § 10, chap. 40, Pol. C., it was made the duty of the county superintendent of schools "to divide his county into school districts, sub-divide and rearrange the boundaries of the same, when petitioned by a majority of the citizens residing in the district or districts to be affected by such change." The records of the superintendent showed the formation of district 64 from parts of 6 and 31 and that it had afterward been dissolved and merged in the original districts. During its separate existence a number of its citizens met, elected officers and voted a tax. These officers afterward executed bonds for the purpose of erecting a school-house. In an action on these bonds against districts 6 and 31 as the successors of 64, on an issue of the legality of its organization, the defendants offered to prove that the superintendent had never been petitioned as required by law. The court refused to permit the proof. *Held*, error. *Held, also*, that the defendants were not estopped to question the legality of the organization of district 64. *Dartmouth S. Bank v. School District*, 332.

## SET-OFF AND COUNTER-CLAIM.

### Liability on Attachment Bond, not Subject of.

By § 119, C. C. Pro., a counter-claim "must be one existing in favor



of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: 1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. 2. In an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action." *Held*, that in an action on contract, a right of action in favor of the defendants on an attachment bond given by the plaintiffs with two sureties in a former action on the same contract would not constitute a counter-claim. *Schuster v. Thompson*, 10.

## SHERIFF.

### Deputy, Acts of.

Under § 603, C. C. Pro., providing that foreclosure sales by advertisement "must be made \* \* \* by the sheriff or his deputy," and § 606, providing "the officer \* \* \* making the sale shall immediately give to the purchaser a certificate of sale." *Held*, that a sale and certificate by a deputy, not in the name of his principal, while "perhaps irregular," was valid. *Hodgdon v. Davis*, 21.

## SPECIFIC PERFORMANCE.

See *Appeal*, 13; *Contract*, 1.

### The Contract, Sufficiency of the Evidence to Establish.

E., a real estate agent, wrote to H., the owner of certain lots, for the agency to sell them and for the price at which they might be sold. Upon receipt of the answer giving the price, E. telegraphed H. that he accepted his offer. H. afterward refused to execute a deed. *Held*, there was no sufficient evidence of a contract between the parties to authorize a judgment of specific performance. *Edmison v. Hancock*, 231.

## STARE DECISIS.

### Office and Officer — Compensation.

A county treasurer is not entitled to commission on money received on the sale of bonds for the erection of a court-house, although the statute, § 15, chap. 89, Pol. C., as amended, chap. 20, L. 1879, fixing the same on which he is to have commission as compensation for his services, uses this language: "In computing the amount collected, for the purpose of charging percentage, all sums, from whatever source derived, shall be included together." So *held*, on the authority of *Territory v. Cavanaugh*, 3 Dak. 325. *Sandager v. Walsh County*, 31.

## STATUTES.

See, also, *Code Citations*; *Forcible Entry and Detainer*; *Pleading*, 3; *Railroad Companies*, 2.

### Construction.

1. Chap. 52, Laws 1883, provided that the county treasurer shall charge and collect a certain sum as "compensation for publishing" the notice of delinquent tax sale, "which sum shall be paid into the county treasury, and the county shall pay the costs of publication." Section 1, chapter 51, approved March 11, 1887, provided that "in all cases where publication of legal notices of any kind are required, \* \* \* the person \* \* \* shall be required to pay" the rates therein specified. A party contracted with a county to publish "all notices \* \* \* at the established rates approved March 11, 1887." Part of the work done by him was publishing the delinquent list. *Held*, his compensation therefor was to be determined by the act of 1887, not by what the treasurer had charged, and that the 1887 rate was in accordance with the terms of his contract. *CARLAND, J.*, dissenting. *Gossage v. Pennington County*, 105.



2. Where at the time a contract was entered into for the construction of a building, a sub-contractor, to acquire a lien, was, under § 656, C. C. Pro., required to give the owner of the property notice of his intention to furnish materials, but before the materials were furnished the law was changed, dispensing with notice (§ 1, chap. 84, L. 1883), *held*, that the change affected the remedy merely and that the sub-contractor could acquire a valid lien without the notice required at the time the construction contract was entered into. *St. Croix L. Co. v. Mitchell*, 215.

3. An act, chap. 38, L. 1885, creating a new county by the segregation of others, contained a provision that the act should not go into force unless "a majority of the legal voters of said Kidder county and of said range 69 shall vote in favor of said segregation," *held*, that a separate (not an aggregate) majority vote of the county and the range would be required in order to organize the county. *Van Dusen v. Fridley*, 322.

4. The provisions of chap. 26, Laws 1879, making unlawful the sale of intoxicating liquors without a license, remain in force in a county even though it may have adopted prohibition under the local option law, chap. 70, Laws 1887, and a party may be prosecuted under the act of 1879, although prohibition was in force in the county at the time of the commission of the alleged offense and had been rejected when the indictment was found. *Territory v. Pratt*, 483.

#### **Trial — Instructions.**

5. Where a prosecution for selling intoxicating liquors rested on the testimony of the prosecuting witness, the court charged the jury that the only evidence they could consider as to the intoxicating character of the liquor was that of this witness, "who claims that he tasted it the day he bought it, and before it left his hands and control," but informed them that they had "a right to believe or disbelieve his testimony," and the matter was purely one of fact for them, *held*, there was no error committed under § 877, C. Cr. Pro., which provides that "in charging the jury the court must state to them all matters of law which it thinks necessary for their information in giving their verdict, and if it state the testimony of the case, it must, in addition, inform the jury that they are the exclusive judges of all questions of fact." *Id.*

#### **Appeal — Review — Sufficiency of Evidence.**

6. Where, on a trial for selling intoxicating liquors without a license, the prosecuting witness testified positively that he tasted the liquor, that it was whisky, and that he knew that kind of liquor from having drank it before, *held*, the verdict was supported by evidence. *Id.*

#### **Repeal.**

7. During the existence of a general statute, § 3, chap. 26, Laws 1879, authorizing boards of county commissioners to fix liquor licenses "at the rate of not less than \$200, nor more than \$500 per year," a statute was passed incorporating a certain city, which contained a provision in its charter, that the board of county commissioners of the county in which the city was located should not, within the limits of the city, exact a license for that business to "exceed \$150 per year." After this, the general statute was amended, chap. 71, Laws 1887, so that the rate was required to be "not less than \$500, nor more than \$1,000 per annum," and "all acts and parts of acts inconsistent" therewith were repealed. *Held*, that the charter provision was not repealed. *Territory v. McPherson*, 27.

### **SUBROGATION.**

#### **Right of — Mortgage — Redemption.**

1. A., the owner of certain land on which there were two mortgages, conveyed it with covenants of warranty to B., who, before the delivery of the deed on representing he was the owner, mortgaged it to C. and D. and paid off the prior liens though it did not appear they were due. These mortgages were immediately recorded. Afterward, B., on the delivery of the deed,

executed to A. a purchase-money mortgage, he having no knowledge of C. and D.'s mortgages. The deeds and mortgage were at once recorded. Under § 1714, C. C., providing that "every person having an interest in property subject to a lien, has a right to redeem it from the lien, at any time after the claim is due, and before his right of redemption is foreclosed," *held*, as against the purchase-money mortgage, C. and D. were entitled to be subrogated to the rights of the prior lien-holders. *Kalscheuer v. Upton*, 449.

#### **Time of Redemption.**

2. The provision in this section as to paying the lien "at any time after the claim is due," was made for the benefit of the lien-holder, and no one but him can object to its being paid before it is due. *Id.*

### **SUPPLEMENTARY PROCEEDINGS.**

Inadequacy of, see *Equity*, 2.

### **TAXES.**

Validity, see *Constitutional Law*, 9, 10.

#### **Action to Recover Back — When Maintainable.**

1. Under § 78, chap. 28, Pol. C., providing that "when, by mistake or wrongful act of the treasurer, land has been sold on which no tax was due at the time, the county is to save the purchaser harmless by paying him the amount of principal and interest to which he would have been entitled had the land been rightfully sold." *Held*, that where the treasurer sold land not subject to taxation (property of the United States) the county was liable to the purchaser for the amount paid and the statutory interest, thirty per cent per annum. *TRIPP*, C. J., dissenting. *Wallace v. Statsman County*, 1.

#### **Rights of Mortgagee.**

2. A mortgagee has no such interest in the land as will enable him to redeem it from a void tax sale and recover back the money, although it was paid under protest. *TEMPLETON*, J., dissenting. *Rushton v. Burke*, 478.

### **TRIAL.**

See, also, *Chattel Mortgages*, 4, 6; *Constitutional Law*, 8; *Criminal Law*, 8, 9, 10, 11; *Statutes*, 5.

#### **Argument of Counsel — Appeal to Prejudice.**

1. In a prosecution for obtaining property under false pretenses by means of a mortgage which the defendant claimed was given to him for a patent right, the prosecuting attorney, in his closing argument to the jury, stated: "Some one had said there are three kinds of robbers; daylight robbers, robbers in the night and patent-right robbers." *Held*, these remarks would not warrant granting a new trial. *Territory v. Ely*, 128.

#### **Case for Jury.**

2. *Held*, that the connection between the two fires (the one alleged to have been negligently set out by the defendant and the one that destroyed plaintiff's property) described on the former appeal, 5 Dak. 444, 41 N. W. Rep. 669, was, on the second trial, shown to be such as required the submission of the case to the jury. *Pielke v. Chicago, M. & St. P. Ry. Co.*, 444.

### **TROVER AND CONVERSION.**

#### **Title, Sufficiency of Evidence to Sustain.**

1. In an action for the conversion of certificates of deposit by an indorsee bank, against persons who had taken them from its correspondent on an attachment against its immediate indorser, the fact that the plaintiff bank on hearing of the dishonor of the certificates charged them back to the indorser on his account, is not sufficient evidence of want of title to the certificates to authorize

the court in directing a verdict against the plaintiff bank. *First Nat. Bk. v. Dickson*, 301.

### **Growing Crops—Rights of Mortgagee.**

2. In an action of trover by a mortgagee of a crop being raised on shares, against the owner of the land who had taken possession, harvested and converted the crop to his own use under an alleged prior agreement with the mortgagor, the parties to the suit treated the owner and mortgagor as occupying the relation of landlord and tenant, and, there being evidence that the mortgage was duly filed prior to the making of the agreement under which the defendant took possession, and that the value of the share taken (after being harvested) was about equal, or exceeded the mortgagee's interest, *held*, the court properly refused to direct a verdict in favor of the defendant. *Perry v. Beaupre*, 49.

### **Measure of Damages — Trial — Instructions.**

3. The measure of damages for the conversion of personal property by § 4603, C. L., is the value of the property at the date of the conversion with interest thereon, or where the action is prosecuted with reasonable diligence, the highest market value at any time between the conversion and verdict at the option of the injured party. The plaintiff in his complaint demanded judgment for the value at the date of the conversion with interest. The court over objection admitted proof of value intermediate the conversion and verdict; but in its charge to the jury limited the damages to the value at the date of the conversion with interest. There was no sufficient evidence of the value of the property at the date of the conversion to support the verdict; *held*, the judgment must be reversed. *Thompson v. Schaetzel*, 284.

### **Election of Measure of Damages.**

4. The question of the plaintiff's election of the measure of damages he will rely upon under this statute considered, but not determined. *Id.*

## **USURY.**

D. entered into a contract with H. whereby he loaned him a certain sum of money and took his note and mortgage therefor, which was also made to include a first mortgage on the property, which D. agreed to pay off, and the entire debt bore interest at the highest rate allowed by law. At the time D. did not pay off the first mortgage, which drew a much lower rate of interest. *Held*, the contract was not usurious. *Hodgdon v. Davis*, 21.

## **VERDICT.**

See *Appeal*, 15; *Criminal Law*, 11; *Jury*, 2; *Replevin*.

## **WAIVER.**

See *Insurance*.

## **WARRANTY.**

See *Mortgage*, 3.

## **WATERS AND WATER-COURSES.**

### **Water rights — Priority.**

1. The right of a homestead settler to the use of the water flowing over land, is superior to that of one entering upon the land under the United States statutes and customs of miners in the locality, and locating a water right subsequent to the settler's occupancy, but prior to his final proof. *FRANCIS and CARLAND, JJ.*, dissenting. *Sturr v. Beck*, 71.

### **Injunction — Estoppel.**

2. In such case where S., the water-right claimant, sought to restrain B. from diverting the water, it appeared that he, S., in 1880, without a grant,

went upon land on which B.'s grantor had settled in 1877, and located a water right according to the recognized custom of the locality where the land was situated, constructed his ditch and had the uninterrupted use of the water for the purpose of irrigation till B. diverted it in 1886; that B.'s grantor in 1879 applied to enter the land as a homestead, made his final proof in 1888, received his patent the same year and conveyed the land to B., with covenants of warranty in 1884. It also appeared that B.'s grantor in 1882 entered into an agreement with S., in reference to the construction of another ditch in which, by way of recital, it was stated S. owned this water right; this agreement was recorded at the time. The patent to B.'s grantor contained the usual condition of being "subject to any vested and accrued water rights." *Held*, that B.'s grantor was the prior appropriator of the water right, and S. had no right of action. FRANCIS and CARLAND, JJ., dissenting. *Id.*

Co. J. H.

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